A submitted 1-27 John D. McLemore
Oct 15
Affirmed.
Davis & Wirt

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 238.

JOHN D. McLEMORE, PLAINTIFF IN ERROR,

vs.

THE LOUISIANA STATE BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA,

FILED OCTOBER 13, 1873.



SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA:

United States circuit court. Fifth circuit and district of Louisiana.

JOHN D. McLEMORE
vs.
L'A STATE BANK. } No. 5862.

Petition.—Filed May 12th, 1869.

To the honorable the judges of the circuit court of the United States for the fifth circuit, district of Louisiana:

John D. McLemore, a citizen of the State of Mississippi, residing in Carroll County of said State, respectfully shows, that the Louisiana State Bank, a corporation created by the laws of Louisiana, carrying on the business of banking in New Orleans, in said State, and
2 whose corporation are citizens of Louisiana, respectfully represents, that the said Louisiana State Bank is indebted to plaintiff for this, to wit:

Plaintiff was holder and of a prommissory note for the sum of nine thousand three hundred and thirty-three dollars, made by J. D. Hawkins and Frank Hawkins, payable to plaintiff's order, dated 12th January, 1861, and payable March 1st, 1862.

He was also the owner of an acceptance of A. J. Rugely & Co. of the draft of J. B. Hawkins, favor of J. D. Hawkins, dated Feb'ry 14th, 1861, and payable 1st January, 1863, for sixty-six hundred and sixty-six dollars $\frac{66}{100}$.

And also the owner of a note drawn by J. B. Hawkins to the order of A. J. Rugely & Co. for seven thousand ($7,000) dollars, due the 1st and 4th July, 1862.

Petitioner was a member of the commercial house of McLemore, Rayburn & Co., of New Orleans, and he kept the aforesaid notes and bills, altho' they were his separate property in the firm's safe.

He shows that on the 3rd March, 1862, said McLemore, Rayburn & Co. pledged to defendant the aforesaid notes of J. D. & Frank
3 Hawkins for $9,333 to secure the payment of a promissory note of sixty-five hundred and twenty-five dollars ($6,525,) which said bank had discounted, dated the 3d March, 1862, payable at four months thereafter.

And on the 16th February, 1861, they pledged the said acceptance of A. J. Rugely & Co.'s draft of J. B. Hawkins, favor of J. D. Hawkins, for $6,666\frac{66}{100}$, due 1st January, 1863; also another acceptance of A. J. Rugely & Co., draft of J. B. Hawkins, favor of J. D. Hawkins, for $6,666\frac{66}{100}$, payable 1st January, 1862, to said defendants to secure the payment of a promissory note for ten thousand three hundred and twenty dollars, made by McLemore, Rayburn & Co., dated 15th February, and payable 15th November, 1862, which defendant had also discounted, and by agreement the last-mentioned acceptance was withdrawn, and in its place was substituted the aforesaid note of seven thousand dollars made by J. B. Hawkins to the order of, and endorsed by, A. J. Rugely & Co., and owned by plaintiff, all which will appear by the copies of the acts of pledge hereto annexed and made part hereof, marked A & B.

Petitioner further shows, that the aforesaid notes and accept-
4 ances remaining on pledge were perfectly good; that the parties

to them were severally bound for the payment, and that they were men of undoubted ability to meet all their obligations.

Plaintiff represents that he has called on the proper officers of the said Louisiana State Bank and demanded his aforesaid notes, which had been pledged as aforesaid, and offered to pay, and in fact tendered payment of the money, principal and interest, which said McLemore, Rayburn & Co. had borrowed as aforesaid, and for the payment of which the said notes and bills were pledged as security; and the said officers declared to plaintiff that they had not possession of the said notes so pledged as aforesaid, and could give no account to pl'ff of the same.

Pl'ff has heard, and charges that defendant in July, 1865, illegally parted with his said notes and bills pledged as aforesaid, and thereby became responsible for the value of the same in principal and interest, and he avers that were fully worth the full amount thereof, principal and interest; and that defendant is indebted to him in that sum,
5 less the aforesaid sum to secure which they had been pledged, and annexes statement X, showing the balance due at that date, to wit, seven thousand seven hundred and twenty-three dollars $\frac{87}{100}$, which said statement is prayed to be made a part of this petition.

He therefore prays that defendant be cited and condemned to pay to him seven thousand seven hundred twenty three $\frac{87}{100}$ dollars, with eight per cent. interest from 1st July, 1865, till paid, and for costs and for general relief.

(Signed) RANDOLPH, SINGLETON & BROWN,
Sol' for Pl'ff.

Documents A, B, & X.—Filed May 12th, 1869.

A.] DOCUMENT A.

NEW ORLEANS, *3d day of March*, 1862.

Whereas the Louisiana State Bank has discounted a certain promissory note for the sum of sixty-five hundred and twenty-five dollars, made by McLemore, Rayburn & Co., to the order of said bank, dated on the 3d day of March, 1862, payable four months after date thereof:

Now in order to secure the full and punctual payment of said
6 promissory note at maturity, or of any renewal thereof, together with all interest that may accrue thereon, the undersigned do hereby pledge to said Louisiana State Bank the property following, to wit:

A promissory note of J. P. Hawkins and Frank Hawkins, dated 12 January, 1861, payable M'ch 1st, 1862, favor of Col. J. D. McLemore for nine thousand three hundred and thirty-three dollars.

Received the above-mentioned note, New Orleans, July 25th, 1865.
(Signed) CARROLL, HAY & CO.

And it is hereby agreed that, in the event of the non-payment of said note at its maturity, or of any renewal thereof, the president and cashier of said bank are hereby authorized, jointly or separately, as agents of the undersigned, and of the bank, to cause said note to be disposed of for cash, at public or private sale, at the option of the said bank; and the proceeds of said sale shall be appropriated to the payment of said note and interest, and all commissions, costs, and charges attending the said sale.

(Signed) McLEMORE, RAYBURN & CO.

Attest:
(Signed) F. BELLANGER.
(") F. N. D'HEBECOURT.

7 The undersigned L. Bernard, cash'r of the Louisiana State Bank, hereby accepts said pledge in behalf of said bank, and acknowledges to have received the said property pledged, which has been delivered to him by the pledgor.

(Signed) L. BERNARD, *Cash'r.*

A true copy:
N. O., Feb'ry 25, '69.
(Signed) L. BERNARD, *Cash'r.*

B.] DOCUMENT B.

CITY OF NEW ORLEANS,
16*th day of February*, 1861.

Whereas the Louisiana State Bank has discounted a certain promissory note for the sum of ten thousand dollars, made by McLemore, Rayburn & Co., to the order of said bank, dated on the 15th day of February, 1861, payable on the 15th November, after date thereof.

Now in order to secure the full and punctual payment of said promissory note at maturity, or of any renewal thereof, together with all interest that may accrue thereon, the undersigned do hereby pledge to said Louisiana State Bank the following property, to wit:

Two acc'es of A. J. Rugely & Co., dr'fs of J. B. Hawkins, favor
8 of J. P. Hawkins, dated Feb'y 14th, 1860.

1st. Payable 1st January, 1862, for sixty-six hundred and sixty-six $\frac{66}{100}$ dollars.

2nd. Payable 1st January, 1863, for sixty-six hundred and sixty-six $\frac{66}{100}$ dollars.

The first described drafts substituted by a note drawn by J. B. Hawkins' order of A. J. Rugely & Co., due 1–4 July, 1862, for seven thousand dollars.

The note, mentioned in the within pledges, delivered to J. M. Carroll.

(Signed) L. B., *Cr.*

And it is hereby agreed that, in the event of the non-payment of said note at its maturity, or of any renewal thereof, the president and cashier of said bank are hereby authorized, jointly or seperately, as agents for the undersigned and of the bank, to cause said note & acceptances to be disposed of for cash, at public or private sale, at the option of the said bank, and the proceeds of said sale shall be appropriated to the payment of said note and interest, and all commissions, costs, and charges attending the said sale.

9 Attest:
(Signed) F. BELLANGER.
(") F. N. D'HEBECOURT.

The undersigned of the Louisiana State Bank, hereby accepts said pledge in behalf of said bank, and acknowledges to have received the said property pledged, which has been delivered to him by the pledgor.

A true copy.
N. Orl's, Feb'y 25, '69.
(Signed) L. BERNARD, *Cash'r.*

X.] DOCUMENT X.

Statement of amount of collaterals held by Louisiana State Bank, pledged by McLemore, Rayburn & Co.

One note due 1–4 March, 1862, for.....	$9,333 00		
Int. 8% to 25th July, 1865, 1,238 days.....	2,567 60		
			11,900 60
One note due 1–4 July, 1862, for.....	7,000 00		
Int. 8% to 25th July, 1865, 1,116 days.....	1,736 00		
			8,736 00
One draft due 1–4 January, 1863, for	6,666 66		
Int. 8% to 25th July, 1865, 932 days.....	1,380 73		
			8,047 39
			$28,683,99

Notes of McLemore, Rayburne & Co., discounted by the bank, the above being held as security:

One note due 18–21 July, 1862, for.	10,320 00		
Int. 8% to 25th July, 1865, 1,099 days	2,520 37		
		12,840 37	
One note due 18–21 July, 1862, for..	6,526 00		
Int. 8% to 25 July, 1865, 1,099 days	1,593 75	8,119 75	20,960 12
			7,723 87

Citation, issued May 12th, 1869.

The President of the United States of America to the marshal of the District of Louisiana, greeting:

JOHN D. MCLEMORE *vs.* LOUISIANA STATE BANK. } No. 5862.

You are hereby commanded to summon the Louisiana State Bank, whose corporation are citizens of the State of Louisiana, to comply with the demand of John D. McLemore, a citizen of the State of Mississippi, contained in the petition, of which a copy accompanies this citation, or to deliver its answer to the same, in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against it by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held.

And that you make due return hereof on the first Monday of June, 1869.

11 Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 12th day of May, A. D. one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the 93d year.

(Signed) D. URBAN, *Clerk*,
(") By F. B. VINOT, *D'y Clerk*.

Marshal's return.

Received May 13, 1869, by the United States marshal, and on same day of May, 1869, served copy of within citation, plaintiff's petition accompanying same, on La. State Bank, def't named herein, by leaving same in hands of J. A. Blanc, president of said bank, No. 37 Camp street, in this city.

New Orleans, May 17th, '69.

(Signed) H. FREDERICK,
Dep. U. S. Marshal.

Exceptions, filed May 25th, 1869.

U. S. circuit court, fifth circuit and district of Louisiana.

JOHN D. McLEMORE
vs.
THE LOUISIANA STATE BANK.

The said defendant now comes and pleads the following exceptions to the plaintiff's petition, to wit:

12 1st. That the petition discloses no legal right or cause of action against this respondent.

2nd. That McLemore, Rayburn & Co., the pledgors, referred to in this petition, are *are* necessary parties to this suit.

3rd. That the source of plaintiff's obligation, if any exists, which is denied, arises from an alleged violation of said contract of pledge, to which plaintiff was not a party, and therefore cannot maintain this action without an assignment from said McLemore, Rayburn & Co. of their rights as pledgors under said contract.

4th. That the pl'ff's petition is vague & indefinite in not setting forth the grounds of the illegality complained of without specification, of which respondent cannot prepare a defence or safely answer him.

Respondents pray that their exceptions be maintained, & that they be excused from answering in the premises and for general relief.

(Signed) J. McCONNELL,
Of Counsel for La. State Bank.

13 *Motion and order exceptions fixed.—Extract from the minutes, May 2d, 1870.*

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.—April term, A. D. 1870.

NEW ORLEANS, *Monday, May 2d*, 1870.

Court met pursuant to adjournment. Present the honorable Wm. B. Woods, presiding judge; the honorable E. H. Durell, district judge.

JOHN D. McLEMORE
vs.
THE LOUISIANA STATE BANK. No. 5862.

On motion of Randolph, Singleton & Browne, solicitors for plaintiff, ordered that the exceptions herein be assigned for trial for Saturday, 7th May instant, at 11 a. m., and that defendants be notified hereof.

Hearing and submission of exceptions.—Extract from minutes, May 7, 1870.

JOHN D. McLEMORE
vs. } No. 5862.
THE LOUISIANA STATE BANK.

The exceptions filed herein came up—Randolph, Singleton & Browne, for plaintiff; Ja's McConnell, for defendant—when, after hearing
14 the pleadings and arguments, the court took time to consider.

Order exceptions overruled—Extract from minutes, June 20th, 1870.

JOHN D. McLEMORE
vs. } No. 5862.
THE LOUISIANA STATE BANK.

Ordered that the exceptions be overruled, and that defendants file their answer.

Deposition.—Filed July 7, 1870.

JOHN D. McLEMORE
vs. } No. 5862.
THE LOUISIANA STATE BANK.

United States circuit court, fifth circuit & district of Louisiana.

Interrogatories to be propounded to Joseph W. Carroll, the answers to which are to be used on behalf of the plaintiff in the trial of the above-entitled cause.

1st. Are you acquainted with J. D. Hawkins and Frank Hawkins, of the State of Mississippi?

2nd. How long have you known them? Where have they resided since you have known them?

3rd. What has been their business since you have known them?
15 4th. Who has been their merchants in the city of New Orleans since you have known them?

5th. Since you have known J. D. and Frank Hawkins, what has been their pecuniary condition? Have they been always considered poor or rich men since you have known them? Since you have known them, have they been considered insolvent or have they been considered solvent?

6th. Did you ever have occasion to take up any of their paper pledged to or held by the Louisiana State Bank? If yea, when did you take up said paper?

7th. Was the paper of J. D. and Frank Hawkins held by said bank pledged to the bank by McLemore, Rayburn & Co.? From what officer of said bank did you obtain said paper? What sum did you pay for said paper.

8th. What was the nature and amount of the paper of said J. D. and Frank Hawkins thus taken up by you? Describe the same as fully as you can.

9th. Did you obtain said paper at private or public sale? Where
16 did you go to take up said paper, and where did you find the same?

10th. At whose instance did you take up said paper? For whose account did you take up said paper?

11th. At the time said bank was about to take said paper in pledge, did you have occasion to converse with any of the directors of said bank as to the pecuniary ability of the said J. D. & Frank Hawkins or either of them? If yea, name the director or directors who had anything to say to you in regard to the said J. D. and Frank Hawkins or either of them? What did you, on that occasion, inform said director or directors? Why did said director or directors have anything to say to you in regard to the pecuniary standing of said J. D. and Frank Hawkins or either of them? What did you inform said director or directors as to the pecuniary standing of said J. D. and Frank Hawkins, or either of them?

12th. What was the pecuniary standing of the said J. D. and Frank Hawkins, or either of them, at the time you took up their paper held by said bank?

17 13th. What would you have informed those in charge of said bank was the pecuniary standing of the said parties, or either of them, had they inquired of you, at the time you took up said paper? What was really the pecuniary standing of the said J. D. and Frank Hawkins, or either of them, at the time you took up said paper held by said bank?

14th. What did you do with said paper after you took it up? Did you retain it, or did you send it to the said J. D. & Frank Hawkins, or either of them? How much did you charge the said parties (J. D. and Frank Hawkins or either) for said paper?

15th. At the time you took up the said paper held by said bank, had the said Hawkins or either of them any cotton in this city for sale; if yea, in whose hands was said cotton? What sum did said cotton sell for? What became of the proceeds arising from the sale of said cotton?

16th. Could the pecuniary standing of said J. D. & Frank Hawkins, or either, have been ascertained by inquiry from any one in this city at the time you took up said paper; if yea, from whom could their pecuniary condition have been learned?

18 17th. If you had desired to learn the pecuniary condition of said parties, or either of them, at the time you took up said paper, what steps would you have taken to obtain such information?

18th. If you know any other fact or circumstance not already stated that will aid the plaintiff in this suit, you will please state the same fully and in detail, as though you were specially interrogated in regard thereto.

(Signed) RANDOLPH, SINGLETON & BROWNE.
Att'ys for the Plaintiff.

It is hereby agreed that any judge or justice of the peace, or commissioned in this city, may receive the answers of Mr. Joseph W. Carroll to these direct and cross interrogatories, at such time and place as shall suit the convenience of Mr. Carroll, without commission or order of court, and the certificate of such officer taking his answers to said direct & cross interrogatories shall be full proof of his official capacity to do so.

New Orleans, June 28, 1870.

(Signed) J. McCONNELL,
Att'y La. State Bank.

19 The defendants reserves all legal exceptions to the foregoing interrogatories to be stated and urged upon the trial of the case, and now specially excepts to said interrogatories from the 5th to the 18th inclusive, as being questions upon matters wholly irrelevant under the pleadings, their being no allegations in the petition under which the

answers to said questions, or either of them, if made, would be admissible in evidence. Def't excepts specially to the 11th & 13th interrogatories as being intended to prove conversations between third parties, for whose acts or conversations def't is not responsible, & cannot be bound thereby.

Except int. 12, as being a matter of individual opinion & not legal proof of the matter sought to be proved.

With the above reservations def't propounds the following cross-interrogatories:

X-int. 1. Have you in your answers to each of the foregoing interrogatories stated only what you knew of your own personal knowledge, or have you stated what you heard or learned from other persons?

20 Please to state what facts you know personally to be true, and what matters you have spoken of that you believe to be true from information derived by you from other persons.

X-int. 2. If you say that you purchased the notes inquired of from the La. State Bank, please state w'ether it is not the fact that the said bank was at that time in charge of a military commission, and its affairs being liquidated by three commissioners or liquidators, appointed by the maj.-general then commanding the national troops in the State of Louisiana; and you will please state the names of the said military liquidators. Were they not Messrs. J. M. Lapeyse, C. Roselius, and A. Miltenburger.

(Signed) J. McCONNELL,
Att'y La. State Bank.

Deposition of Joseph W. Carroll, a witness produced, sworn, and examined at the office of Jas. Hoy & Co., in the city of New Orleans, State of Louisiana, on the second day of July, eighteen hundred and seventy, before me, Andrew Hero, jr., a duly appointed and authorized notary public, in and for the parish of Orleans, State

21 of Louisiana, authorized to take depositions, administer oaths, and so taken under and by virtue of the annexed written agreement of counsel, and to be read as evidence in behalf of plaintiff in a certain suit pending in the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein John D. McLemore is plaintiff, and the Louisiana State Bank is defendant, as follows:

Said JOSEPH W. CARROLL, a resident of said city of New Orleans, and aged fifty years and upwards, being by me, said notary, first carefully examined & cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes & says in answer to the annexed interrogatories, and cross-interrogatories, as follows:

To the first interrogatory he saith: I am.

To the second interrogatory he saith: About fifteen years John D. has resided both in North Carolina & Mississippi, and Frank has always resided in Mississippi.

To the third interrogatory he saith: Frank has always been in the planting business, and John D. has engaged in it since 1862. As

22 to J. D 's business prior to that date I am uninformed.

To the fourth interrogatory he saith: I cannot say as to Jno. D. Hawkins prior to 1865; but since that date, and for the years '65, 1866, & 1867, Carroll, Hoy & Co., of which I was a member, did his business. Frank has for the ten or twelve years prior to 1867 done business with the firm of Carroll, Hoy & Co., and other houses of which I was a member.

To the fifth interrogatory he saith: I have always considered them solvent.

To the sixth interrogatory he saith: I bought their paper from said bank in or about July, eighteen hundred and sixty-five.

To the seventh interrogatory he saith: It was from Mr. Lapeyre, one of the commissioners of the bank, through Mr. Miltenburger, another commissioner, informed me that I could have it. I paid ($7,500) seven thousand five hundred dollars for it in La. State Bank notes.

To the eighth interrogatory he saith: I think that it was their
23 joint note for nine thousand three hundred & thirty-three $\frac{33}{100}$ dollars, and perhaps it was endorsed by Rugley, Blair & Co., but I cannot say positively without seeing the papers.

To the ninth interrogatory he saith: At private sale, at the banking-house of the Louisiana State Bank.

To the tenth interrogatory he saith: In May, eighteen hundred & sixty-five, John D. Hawkins informed me that a certain note, the one above alluded to, was out, and as soon as I should be in funds from him, he desired that I should obtain the note. Shortly afterwards, discovering a favorable opportunity to purchase the note, but having no funds of the Hawkins' on hand, I purchased the note for my firm of Carroll, Hoy & Co., and upon Hawkins's re-imbursing me from the actual cost or price paid for it, it was transferred and delivered to John D. Hawkins.

24 To the eleventh interrogatory he saith: In eighteen hundred and sixty-one, or the early part of 1862, John R. Shaw, now deceased, then one of the directors of said Louisiana State Bank, called upon me to ascertain what I knew as to the Hawkins responsibility; informing me that McLemore, Rayburn & Co. desired some accommodation, and had proffered paper of the Hawkins'; I replied that I regarded the Hawkins' as being entirely good.

To the twelfth interrogatory he saith: I did not know, but considered them good.

To the thirteenth interrogatory he saith: I would have replied as above; I can only again as above.

To the fourteenth interrogatory he saith: I kept it until they paid my firm the cost of it; I cannot positively if it was delivered in person or mailed; I think the latter. I charged Jno. D. Hawkins forty-three hundred and fifty dollars, being the amount actually paid in United States currency.

25 To the fifteenth interrogatory he saith: They had not.

To the sixteenth interrogatory he saith: I cannot say.

To the seventeenth interrogatory he saith: I would have written to some one in the neighborhood or county of their residence.

To the eighteenth interrogatory he saith: I know of nothing more.

To the first cross-interrogatory he saith: I have; all is of my own personal knowledge.

To the second cross-interrogatory he saith: It was in the hands of three commissioners, but I cannot say as to by whom they were appointed. The three persons named, viz, C. Roselins, J. M. Lapeyre, and A. Miltenburger, were there in charge.

(Signed) JOS. W. CARROLL.

I, said notary, do certify that the preceding deposition was reduced to writing by me, and signed by the said Carroll, and that I am not of counsel or attorney for either of the parties to said suit, nor am I interested

in the event thereof, as witness my hand & seal at New Orleans,
26 this second day of July, A. D. 1870.
[SEAL.] (Signed) ANDREW HERO, JR., *Not. Pub.*
(Fees $6.)

[5 ct. int. rev. stamp attached.]

Judgment by default.—Extract from the minutes, Nov'r 22d, 1870.

JOHN D. McLEMORE
vs. } No. 5862.
THE LOUISIANA STATE BANK.

On motion of Randolph, Singleton & Browne, attorneys for plaintiff, and on showing to the court that defendant has failed to answer, although duly cited,
Ordered that judgment by default be rendered against them.

Order default set aside.—Extract from the minutes, Nov'r 30, 1870.

JOHN D. McLEMORE
vs. } No. 5862.
THE LOUISIANA STATE BANK.

On motion of Ja's McConnell, attorney for defendant, and on filing answer,
Ordered that the judgment by default herein entered on the 22d instant be set aside.

27 *Answer and two documents C & D.—Filed November 30th, 1870.*

ANSWER.

U. S. circuit court.

J. D. McLEMORE
vs. } No. 5862.
LOUISIANA STATE BANK.

The said defendant now comes, & not waiving, but, on the contrary, insisting upon the exceptions heretofore filed for answer, denies all and singular the allegations contained in the plaintiff's petition except as may be hereinafter admitted.
Respondent admits that the commercial firm of McLemore, Rayburn & Co. did procure two loans by discount of their paper; one on the 16th of Feb., 1861, for $10,000.00, due Nov. 15th, 1861, and the other March 3d, 1862, due March 1st, 1862, for $6,525, to secure which they then pledged as collateral security & as their own, & in the usual course of trade, the bills & notes described in said acts of pledge.
Further answering, respondent says that on the 11th of June, 1863, Major-Gen'l Banks, then commanding the armies of the United States in this department, without the fault or consent of respondent, and
in exercise of a military power and force respondents was unable
28 to resist or gainsay, took possession of said Louisiana State Bank, with all its effects, deposits, & property of every description, including the said pledged notes & bills, and placed the same in the custody and control of three military commissioners, with orders "to effect

the liquidation of said bank, and convert into cash as speedily as may be all its assetts according to & in pursuance of Special Orders No. 138, a copy of which is annexed as part of this answer & marked "B." That said military commissioners did accordingly take possession & proceed with said liquidation of said bank, and all said assetts, and that it was not until the 5th January, 1866, that said military liquidation ceased, & said bank and *and* the assetts & property then remaining restored to its corporators & directors, as will more fully appear from the General Orders No. 2, dated January 5th, 1866, & Special Order No. 16, dated January 19th, 1866, issued by Maj.-Gen'l E. R. S. Canby, then commanding the military forces in said department of Louisiana, copies of which said orders are annexed as part hereof, and marked "C" & "D."

Respondent further shows that it was while said bank & its
29 property & affairs were thus being liquidated by military commissioners, to wit, on the 25th of July & 14th of Aug'st, 1865, that the said bills, notes, & drafts, which had been so pledged by McLemore, Rayburn & Co. as collaterals, were sold by said military commissioners to Carroll, Hoy & Co., & J. W. Carroll, to pay said notes of McLemore, Rayburn & Co. after the same had matured, & had for a long period of time remained unpaid.

Respondents deny the statement in the petition that said pledged notes & bills were parted with illegally. But respondent maintains that if it should appear that any irregularity of any description did occur, (which is again denied,) then that respondent cannot be held liable, because such irregularities or illegalities occurred, if at all, through the fault of said military liquidators, and during a period when the said bank & its directors, corporators, & stockholders were deprived as aforesaid by military force from all care and possession, & consequently of all responsibility for the property and assets of said bank, including the said pledged notes & bills.

Respondent pleads the prescription of one, three, and five years,
30 and prays for trial by jury & for general relief.

(Signed) J. McCONNELL,
Att'y La. State Bank.

C.] DOCUMENT C.

[General Orders No. 2.]

HEADQUARTERS DEPARTMENT OF LOUISIANA,
New Orleans, La., January 5th, 1866.

1st. With the exceptions and subject to the conditions hereinafter mentioned, the control of the following-named banks and banking associations, and their assets, will be restored to their corporators, and the military liquidators now in force will lease:

The State Bank of Louisiana.
The Bank of Louisiana.
The Crescent City Bank.
The Bank of New Orleans.
The Merchants' Bank.

2nd. An election will be held on the fourth Monday of January instant, between the hours of 10 o'clock a. m. and 12 m., at the banking-house of each of these institutions, for a board of directors. The election will be conducted in strict accordance with the laws of the State and the charter or articles of association of each corporation,
31 under the direction of inspectors to be appointed by these headquarters.

3rd. The directors elected will be vested with the control of the bank for which they are elected on fulfilling the requirements of this order and the laws of the State, and a report of the result of the elections will at once be made to these headquarters by the inspectors.

4th. The military liquidation now in force will continue until the directors shall comply with the provisions of this order.

5th. In transferring the control of these banks, no right or interest of the Gover'ment is relinquished, but all its rights in any cotton purchased by the banks during the rebellion, and in all bonds or stocks issued by State, municipal, or parochial authorities in furtherance of the rebellion, are expressly reserved, and each board of directors will be required to furnish adequate security for the protection of the rights of the Gover'ment.

6th. The assetts of each bank will be held subject to the redemption of its circulation, w'ether issued pursuant to or in consequence of
32 any military order or exigency, or in the ordinary course of business.

7th. The liquidation will continue under the directors, and the civil courts of the State are prohibited from interfereing with it in any manner until after the expiration of thirty days from such time as the National Gover'ment may return to the State auditor the bonds and securities deposited to secure the circulation, and now held by the Federal authorities as captured.

8th. The provisions of this order relating to property in which the Gover'ment has or may have an interest are extended to and made applicable to all banks and banking associations in this State.

By order of Major-General E. R. S. Canby.

(Signed) WICKHAM HOFFMAN,
Assistant Adjutant-General.

Official:

(Signed) NATHANIEL BURBANK,
Acting Assistant Adjutant-General.

D.] DOCUMENT D.

[Special Orders No. 16.—Extract.]

HEADQUARTERS DEPARTMENT OF LOUISIANA,
New Orleans, La., January 19th, 1866.

* * * * * * *

33 2. The following-named persons are appointed inspectors of the election to be held at the banking-house of the State Bank of Louisiana on the fourth Monday of January instant, pursuant to General Orders No. 2, current series, from these headquarters.

WILHELMUS BOGART.
SAMUEL H. KENNEDY.
WILLIAM M. PERKINS.
ALPHONSE MILTENBER.
ANTOINE CARRIERE.

By order of Major-General E. R. S. Canby.

(Signed) WICKHAM HOFFMAN,
Assistant Adjutant-General.

Official:

(Signed) NATHANIEL BURBANK,
1st. Lieut., Acting Ass't Adj't General.

Document B, referred to in answer.—Filed Nov'r 30th, 1870.

B.

Special meeting of Wednesday, 17th June, 1863.

Present, J. M. Lapeyre, Pres't Blanc, Brother, Brugin, Giepi, Kenedy, and Oliver.

The president laid before the board the following order, handed to him yesterday, which was read and ordered to be spread on the minutes:

HEADQUARTERS DEP'T OF THE GULF,
34 19TH ARMY CORPS,
Before Port Hudson, 11th June, 1863.

[Special Orders No. 138.—Extract.]

* * * * * * *

4th. Satisfied from an examination of the report of the Louisiana State Bank, made by the provost-marshal-general, in pursuance of Special Orders No. 87, that the said bank is insolvent, the commanding general hereby appoints Colonel Cha's C. Dwight, 160th New York Volunteers, A. Miltenberger, and J. M. Lapeyre commissioners to effect the liquidation of said Louisiana State Bank; to convert into cash, as speedily as may be, all the assets of that corporation, including the sums that may have remained unpaid by stockholders upon their respective shares of the capital stock, and, after providing for the payment of the bill-holders, to distribute the same as now provided by law in case of insolvencies of individuals.

The commissioners herein named will take possession of the effects of the Louisiana State Bank, and enter on the discharge of their duties immediately.

By command of Major-General Banks.

(Signed) RICHARD B. IRWIN,
A. A. General.

35 Official copy:
(Signed) HENRY L. PIERSON,
Capt. & A. A. G.

Whereupon the board unanimously declared that while submitting to the above order, which they have no power to resist, they deem it unjust, oppressive, and ruinous, and solemnly protest against it on behalf of the stockholders.

An inventory of the assets of the bank was ordered to be made with a view to hand the same to the commissioners appointed by the order, and the president was, at the same time, requested to exert all honorable means to have the above order rescinded or so modified as to allow the liquidation of the bank to be effected in a manner less disastrous than the one pointed out by the order.

After which the board adjourned.

(Signed) J. M. LAPEYRE, *President.*
(Signed) L. BERNARD, *Cashier.*

STATE NATIONAL BANK,
New Orleans, March 9, 1872.

36 I certify the foregoing to be a full and complete copy of the minutes of the proceedings of the board of directors of the

Louisiana State Bank, at their meeting of 17th June, 1863, and spread upon folios 235, 236, and 237 of record-book E.

In testimony whereof I have hereunto affixed my official signature under the seal of the State National Bank of New Orleans, formerly the Louisiana State Bank.

(Signed) CHA'S L. C. DUPUY, *Cashier.* [SEAL.]

Motion and order for commission.—Extract from minutes March 25, 1871.

United States circuit court, fifth circuit & dist. of Louisiana.

JOHN D. MCLEMORE } *vs.* } 5862.
LA. STATE BANK. }

On motion of Randolph Singleton and Browne, of counsel for plaintiff, and on exhibiting the annexed affidavit & interrogatories made a part of this motion—

It is ordered by the court that a commission issue and be directed to C. P. Newell, mayor of Carrollton, in Carroll County, State of
37 Mississippi, and also justice of the peace, or any other justice of the peace or judge residing in said county, commanding them, or either of them, to take the testimony of the witnessess whose names are mentioned in said affidavit, and that the counsel for defendant in said suit be served with copies of said interrogatories, affidavit, and this motion, and that he be required to file his cross-interrogatories within the legal delay, that 30 days be allowed for the execution & return of said commission.

Commission for plaintiff.—Issue 10*th May*, 1871, *and returned and filed June* 2*d*, 1871.

Circuit court of the United States for the fifth judicial circuit, holding sessions in and for the district of Louisiana.

To C. P. Newell, mayor of Carrollton, in Carroll County, State of Mississippi, and also justice of the peace, or any other justice of the peace or judge, residing in said county.

Know ye that, reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you
38 call and cause to come before you James L. George, William Cathran, John D. McLemore, W'm Ray, and Col. F. G. Neil, residing in Carroll County, State of Mississippi, and them duly examine on the annexed interrogatories, on oath, touching and concerning certain matters and things in a case now depending in the said court, wherein John D. McLemore is plaintiff and the Louisiana State Bank defendant; and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause, and send also this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 10th day of May, anno Domini 1871, and the 95th year of the Independence of the United States of America.

[SEAL.] (Signed) D. URBAN, *Clerk*,
(Signed) By F. B. VINOT,
Dep. Clerk.

39 *Interrogatories annexed to commission.*

United States circuit court for the fifth circuit, district of Louisiana.

JOHN D. McLEMORE
vs. } No. 5862.
LOUISIANA STATE BANK.

Interrogatories to be propounded to James L. George, William Cathran, John D. McLemore, W'm Ray, and Col. G. F. Neil, residing in Carroll County, in the State of Mississippi, the answers to which are to be used on behalf of the plaintiff on the trial of said suit.

1st. Are you 21 years of age? Do you know the plaintiff in said suit?

2nd. Are you acquainted with J. B. Hawkins, John D. Hawkins, and Frank Hawkins, or either of them; if yea, how long have you known them or either of them?

3rd. Where do John D. Hawkins and Frank Hawkins reside? How long have they resided there; what is their occupation?

4th. Do you know anything about the pecuniary standing or
40 ability of said John D. Hawkins, Frank Hawkins, and James B. Hawkins, or either of them? If yea, state your knowledge as to their pecuniary standing or ability or solvency of said parties seperately and in detail.

5th. Have John D. Hawkins and Frank Hawkins been considered rich or poor men?

6th. If, in your answer to the last interrogatory, you state that they have been considered rich, then state how long they have been so considered.

7th. Were they poor or rich in July, 1865?

8th. Were they insolvent or solvent in July, 1865?

9th. Examine the annexed copy of petition, and state what you know as to the allegations therein contained.

10th. Is or is not J. D. Hawkins, named in said petition, the same person named in these interrogatories as John D. Hawkins?

11th. Do you know any other fact or circumstance that will be
41 of service to the plaintiff in said suit? If yea, you will state the same fully and in detail.

(Signed) RANDOLPH SINGLETON & BROWNE,
Att'ys for Pl'ff.

Personally appeared John D. McLemore, who, being duly sworn, deposes and says that he is the plaintiff named in the foregoing and above-entitled suit, and that the testimony of the witnesses James Z. George, William Cathran, John D. McLemore, Wm. Ray, and Col. G. F. Neil is necessary and material to him in the trial of said suit, and that the said parties reside in Carroll County, in the State of Mississippi, and that he cannot go into the trial of said suit in safety without said testimony.

(Signed) JOHN D. McLEMORE.

Sworn to and subscribed before me this 25th day of March, 1871.

(Signed) D. URBAN,
U. S. Comm'r.

Cross-interrogatories annexed to the commission.

U. S. circuit court district Louisiana.

JOHN D. McLEMORE
vs.
LOUISIANA STATE BANK. } No. 5862.

42 The said defendant, having been served with a copy of eleven interrogatories herein propounded to Ja's Z. George, William Cathran, John D. McLemore, Wm. Ray, & Col. F. G. Neil, filed herein March 25th, 1871, reserves all legal exceptions. Excepts specially to 9th interrogatory as being a leading question, presenting the plaintiffs' case, and necessarily suggesting & shaping the answers to be made; further excepts that the testimony sought to be elicited under all due other questions propounded is irrevalent & inadmissable under the pleadings.

Reserving the above & all legal exceptions to be urged upon the trial, respondent propounds the following cross-interrogatories:

1st X. Where did J. B. Hawkins, John D. Hawkins, & Frank Hawkins, and yourself reside in July, 1865? And in what business were each of them and you then engaged, and what amount of capital did each of them & you have at that date so occupied, and what profit in business did they or you make in the year ending July, 1865?

43 2nd X. Did you or any of the Hawkins' named in the foregoing x-interrogatory own at that date any lands or slaves? State as near as you can what losses the said Hawkins' each sustained by the recent war, in slaves or lands or other property. How many slaves did they own in 1862, do you think?

3rd X. If you say that the said John D. Hawkins, Frank Hawkins, & James B. Hawkins were rich men or were solvent in July, 1865, please state how you know it to be so. State what property each possessed, and of what it consisted. Do you know what debts they owed? Don't you know that they did owe some debts; were they not injuriously affected in their property and business by the war, as were other citizens of Mississippi; were they as rich in July, 1865, as in 1860 or 1862?

4th X. Did you know of either of these Hawkins' being sued for debt? Did either of them take the benefit of the bankrupt act?

44 (Signed) J. McCONNELL,
Att'y La. State Bank.

Answer to the interrogatories.

Depositions of witnesses produced, sworn, and examined on the days hereinafter stated at the office of C. P. Newell, mayor of the town of Carrollton, in Carroll County, and State of Mississippi, said officer being in the court-house in said town under & by virtue of the annexed commission issued out of the circuit court of the United States for the 5th judicial circuit holding session in and for the district of Louisiana, to take depositions in a certain cause pending and at issue between John D. McLemore, plaintiff, and the Louisiana State Bank, defendant.

G. F. NEIL, who being first duly sworn on the Holy Bible, on this the 30th day of May, in the year of Lord 1871, doth depose and say as follows:

1st. To first interrogatory he saith: Answer. I am over twenty-one

years of age, and have known the plaintiff, John D. McLemore, for many years.

45 To second interrogatory he saith: Answer to 2d interrogatory. I am acquainted with John D. Hawkins & Frank, both. I have known Frank Hawkins intimately for about twenty years, and I have known John D. Hawkins about ten years, but not so intimately as I have known Frank Hawkins. I am not acquainted with J. B. Hawkins.

To interrogatory 3rd he saith: John D. Hawkins resides in the village of Winona, which, until very recently, was in this county, (Carroll,) but now in the county of Montgomery, (a new county,) on the Mississippi Central Railroad. John D. Hawkins has resided in Winona only a few months, having previously resided on his plantation in Tallahatchie County. Frank Hawkins settled in this county when he first came to the county, & has remained in it during all the time, say from twenty to twenty *to twenty* one or two years. They are *are* both planters.

To 4th interrogatory he saith: I know that John D. Hawkins is regarded as a man of wealth by the community, and I feel confident

46 in the ascertion that he is properly appreciated by the community as to his pecuniary ability and standing. Frank Hawkins has been regarded by me, during my entire acquaintance with him, as a man of wealth, and, from my personal knowledge of his pecuniary standing & ability, I regard him as perfectly responsible for all his obligations and prompt in the discharge of them. I do not know anything about the pecuniary standing of James B. Hawkins, except as I have heard from his brother, Frank Hawkins.

To 5th interrogatory he saith: They have each been regarded as men of wealth.

To 6th interrogatory he saith: They have been considered as rich men from my first anquaintance with them up to the present time.

To the 7th interrogatory he saith: They have been regarded as wealthy during my whole acquaintance with them, and I know of no reverse of fortune that would change my opinion as to this general belief

47 at the time indicated, (except in the amount of their wealth.)

To the 8th interrogatory he saith: They were solvent, I believe, without any doubt.

To 9th interrogatory he saith: I know nothing about the great majority of the allegations and averments in the said petition, except that the allegations that J. D. Hawkins & Frank Hawkins were able at the time mentioned to discharge the obligations particularly specified. I think they were at the time amply able to have met these obligations.

To 10th interrogatory he saith: I can only state my belief in this matter. Frank Hawkins and John D. Hawkins claim to be brothers, and I have heard Frank Hawkins speak in general terms of a transaction of a similar character to the one disclosed in the petition

48 that he & John D. Hawkins had with a bank in the city of New Orleans.

To 11th interrogatory he saith: I do not believe that I know of any other facts that would be of service either to plaintiff or defendant.

To first cross-interrogatory he saith: I understand, from information derived from others, that James B. Hawkins resided in the State of Texas. John D. Hawkins resided on his plantation in Tallahatchie County, and at his brother Frank Hawkins', in the county of Carroll. I was then a resident of the county of Carroll. J. D. Hawkins, Frank Hawkins, and myself were planters in 1865. I cannot say what the

profits of the Hawkins' were. My own profits, if any, were very small. Frank Hawkins resided on his plantation in this (Carroll) county. J. D. Hawkins was the owner—so regarded—of a large plantation in Tallahatchie County, with the appliances to work it. Frank Hawkins was the owner of a large plantation on the Tallahatchie River & one
49 in this county, both being in successful operation and without any incumbrance. I was the owner of a plantation in Carroll County, and half-owner of a plantation on the Tallahatchie River.

To the second cross-interrogatory he saith: I did own land, and had up to the close of the war owned from sixty-five to eighty slaves. The Hawkins' (Frank and John D.) were at the time large land-owners, and had been up to the close of the war, large slave-owners. Frank Hawkins lost all his negroes, several mules, his gin-house, & a portion of his quarters, & some cotton. John Hawkins lost his slaves; and I am not aware of any other losses except such as resulted from the general derangement of affairs in the whole country. I speak of Frank Hawkins' losses from what he has communicated to me. I suppose that Frank & John D. Hawkins owned, in 1862, about one hundred slaves each.

To 3d x-interrogatory he saith: I only know that they were rich
50 men in 1865, by what Frank Hawkins told me about his situation and that of his brother. Frank Hawkins has said to me often that he was out of debt, and had a surplus of cash on hand. He also stated that his brother, John D., was easy in his circumstances, from a surplus cash capital and a large amount of cotton then on hand. Of my knowledge I know nothing of this matter. I know nothing of James B. Hawkins' pecuniary condition at that time. I have previously answered the amount and kind of property that each possessed accurately as I could. I do not know further than I have already stated. I know that John D. owed a portion of the purchase-money of his plantation, & that Frank was his security. This I derived from Frank Hawkins himself. I have already stated that th y were. They were not.

To 4th cross-interrogatory he saith: John D. Hawkins and Frank Hawkins have been sued in a case in connection with, or growing out of, the transaction to which this examination has reference. This is the only suit that I have any knowledge when they were defendants.
51 Neither of them have taken the benefit of the bankrupt act.

(Signed) G. F. NEILL.

Sworn & subscribed before me this 30th day of May, in the year 1871.

(Signed) C. P. NEWELL,
Mayor of the town of Carrollton, & ex-officio Justice of the Peace.

WILLIAM RAY, who, being first duly sworn on the Holy Bible, on this the 30th day of May, in the of our Lord 1871, doth depose & say as follows:

To first interrogatory he saith: I am over twenty-one years of age, and know John D. McLemore, plaintiff in this suit.

To second interrogatory he saith: I do not know J. B. Hawkins. I am very well acquainted with John D. Hawkins and Frank Hawkins. I have known John D. Hawkins eight or ten years, and I have known Frank Hawkins fifteen or twenty years.

To third interrogatory he saith: Frank Hawkins has resided in Carroll County, Mississippi, for the last fifteen or twenty years, and his occu-
52 pation is a planter. John D. Hawkins resides at this time at Winona, Miss., on the Miss. C. R. Railroad. Previous to that time he resided at his plantation in Tallahatchie Co., Miss.

To fourth interrogatory he saith: I know nothing of John B. Hawkins' pecuniary standing or *or* ability. Frank Hawkins and John D. Hawkins each of them have been regarded as men of wealth since I knew them, and have been regarded as solvent.

To the fifth interrogatory he saith: John D. Hawkins and Frank Hawkins have been regarded here as men of considerable wealth.

To sixth interrogatory he saith: John D. Hawkins and Frank Hawkins have been regarded as rich men since I knew them.

To seventh interrogatory he saith: I do not think that John D. Hawkins & Frank Hawkins were poor men on the 6th July, 1865, and they were regarded by the community here as being rich men.

53 To eighth interrogatory he saith: John D. Hawkins and Frank Hawkins were regarded as being solvent in July, 1865.

To ninth interrogatory he saith: I know nothing about the majority of the allegations and averments in the said petition, except that the allegations that J. D. Hawkins & Frank Hawkins were able at the time mentioned to discharge the obligation specified.

To tenth interrogatory he saith: J. D. Hawkins, named in said petition, is the same man named in these interrogatories as John D. Hawkins, or is known by either name in this community.

To eleventh interrogatory he saith: I know nothing more than I have stated.

Cross-interrogatories.

To the 1st x-interrogatory he saith: Myself and Frank Hawkins resided in Carroll County, Miss., in July, 1865, and of my own personal knowledge I do not know where J. B. Hawkins or John D. Hawkins resided at that time. I was not engaged in anything in July,

54 1865. Frank Hawkins was planting at that time. I do not know what business J. B. and John D. Hawkins were engaged in at that time. I had no capital at that time. Frank Hawkins had two large plantations, one Car'oll Co. and one in Sunflower Co., on the Tallahatchie River, all in Miss., with stock, farming utensils, &c. John D. Hawkins had a large plantation in Tallahatchie County, Miss. I made nothing myself in the year ending in July, 1865, and know nothing as to what the Hawkins made in that year.

To the second cross-interrogatory he saith: Myself and the Hawkins were slave-owners in July, 1865, and the Hawkins were large land-owners. I think the Hawkins lost about one hundred slaves each, and some mules, and probably some other stock, by the recent war. I think Frank Hawkins & John D. Hawkins owned, in 1862, about one hundred slaves each.

To the third cross-interrogatory he saith: Frank Hawkins and

55 John D. Hawkins were large land *land*-owners in July, 1865. Their character for prudence & caution in the management of their financial matters, and the fact that I never heard their solvency questioned, is my reason for the conclusion that they were solvent. Frank Hawkins possessed large landed estates & stock. I did not know that they owed a dollar. They were injuriously affected in their property and business by the war, as were other citizens of Mississippi. They were not as rich in July, 1865, as in 1860 or 1862.

To the fourth cross-interrogatory he saith: I never heard of either of these Hawkins being sued for debt. Neither of them took the benefit of the bankrupt act.

(Signed) W'M RAY.

Sworn to and subscribed before me this the 30th day of May, in the year 1871.

(Signed) C. P. NEWELL,
Mayor of Carrollton & ex-officio Justice of the Peace.

JOHN D. MCLEMORE, who, being first duly sworn on the Holy
56 Bible, on this the 30th day of May, in the year of our Lord 1871, doth depose and say as follows:

To the first interrogatory he saith: I am the plaintiff myself.

To the second interrogatory he saith: I am acquainted with John D. Hawkins & Frank Hawkins, but not with J. B. Hawkins. I have known Frank Hawkins some twenty years or more, & John D. Hawkins some ten or twelve years.

To the third interrogatory he saith: John D. Hawkins now resides in the town of Winona, Montsoncey County, Mississippi, formerly Carroll County, & until lately he resided in Tallahatchie County, Miss., on his plantation. Frank Hawkins resides in Carroll County, Mississippi.

To the fourth interrogatory he saith: John D. Hawkins and Frank Hawkins have been, since I have known them, considered perfectly and entirely solvent, and good for all of their liabilities. James B.
57 Hawkins' condition I am not acquainted with.

To the fifth interrogatory he saith: They have always been considered wealthy.

To the sixth interrogatory he saith: They have been considered wealthy ever since I knew them.

To the seventh interrogatory he saith: They were said to be comparatively out of debt, & therefore considered to be rich men.

To the eighth interrogatory he saith: They were considered perfectly solvent in July, 1865.

To the ninth interrogatory he saith: I believe the petition & contents to be true in every particular.

To the tenth interrogatory he saith: I believe J. D. Hawkins and John D. Hawkins to be identically the same man.

To the eleventh interrogatory he saith: Mr. Joseph Al. Carroll, who purchased from the bank the note of McLemore, Rayburn & Co. for six thousand five hundred and twenty-five dollars, ($6,525,) with the
58 note of John D. Hawkins and Frank Hawkins for nine thousand three hundred and thirty-three dollars, ($9,333,) attached as collateral security, told me that Mr. John R. Shaw, one of the directors of the bank, came to him and enquired of him as to the solvency of John D. Hawkins & Frank Hawkins, and he (Carroll) told him that they were perfectly and entirely good.

Cross-interrogatories.

To the first x-interrogatory he saith: I think Mr. J. B. Hawkins resided in Texas. I think Mr. John D. Hawkins' residence was on his plantation in Tallahatchie County, Mississippi. Mr. Frank Hawkins and myself resided in Carroll County, Mississippi, in 1865. I have understood that Mr. J. B. Hawkins was a planter. John D. Hawkins, Frank Hawkins, and myself are all planters. John D. Hawkins, Frank Hawkins, and myself were all considered large planters. I cannot at this time tell the amount of capital each of us had or the amount of our profits.

59 To the second x-interrogatory he saith: We were all the owners of land and slaves, & Frank Hawkins lost his slaves, a

few mules, & some cotton, & had one gin-house & one or two negro cabins burnt. He was the owner of about one hundred slaves. John D. Hawkins lost his slaves—about the same number. I know of no other loss he sustained.

To the third x-interrogatory he saith: John D. Hawkins & Frank Hawkins were considered rich men in July, 1865, for they were compareatively out of debt. & the owner' of large property; their property consisted of lands, stock ofevery description, and cotton. I know of no debts now against them, except these in controversy. All southern planters were injured more or less by the war. I do not believe that they were as rich in July, 1865, as they were in 1860 or 1862. I know nothing of the condition of James B. Hawkins.

To the fourth x-interrogatory he saith: I have no recollection of ever hearing of their being sued until I sued them, and I am fully
60 satisfied that neither John D. or Frank Hawkins have ever taken the benefit of the bankrupt act; I know nothing of James B. Hawkins.

(Signed) JOHN D. McLEMORE,
Mayor & ex-officio Justice of Peace.

Sworn to & subscribed before me this 30th day of May, in the year 1871.

C. P. NEWELL.

I, C. P. NEWELL, the undersigned, mayor of the town of Carrollton, in the county of Carroll, and State of Mississippi, and ex-officio justice of the peace, do certify that I caused G. F. Neill, William Ray, and John D. McLemore, witness' hereinbefore named and examined, to appear before me at the time and place above named, and after publicly and solemnly swearing each separately to tell the truth, the whole truth, and nothing but the truth, in answer to the annexed direct and cross-interrogatories, I then and there proceeded to examine each separately, by propounding to him the said direct and cross interrogatories, and that the answers thereto were reduced to writing by the aforesaid witnesses themselves, in my presence, and that all of the rest of the writing
61 in these interrogatories was done by myself and Robert W. Williamson, in the presence of each witness and myself, and that I then caused each witness to sign his deposition in my presence, as already stated; that neither the said Williamson nor myself is in any manner whatever interested in the suit in which these depositions are taken; in testimony whereof I have hereunto set my hand and affixed my scroll as my seal (having no seal of office, and not being required to have one by law) on this the 30th day of May, in the year 1871.

(Signed) C. P. NEWELL, [SEAL]
Mayor of the town of Carrollton, Carroll County, Mississippi, and ex-officio Justice of the Peace.

Rule taken by plaintiff.—Extract from the minutes, December 7th, 1871.

United States circuit court, No. 5862.

JOHN D. McLEMORE
vs.
LOUISIANA STATE BANK.

On motion of Randolph, Singleton & Browne, of counsel for plaintiff,

and on showing that plaintiff caused a commission to issue to the
62 State of Mississippi to take the testimony of G. F. Neill, James Z. George, et als., and that said commission has been returned and was filed in the clerk's office on the 2d day of June, 1871,

It is ordered by the court that the defendant show cause on Tuesday, the 12th instant, at 11 o'clock a. m., why said testimony should not be read on the trial of this cause.

Marshal's return.

Received Dec'r 8, 1871, by the U. S. marshal, and on the 9th day of same month and year served a copy of within rule on Ja's McConnell, named herein, by handing the same to him in person, at office 25 Commercial Place.

New Orleans, Dec'r 9th, 1871.

(Signed) S. W. REED,
D'y U. S. Marshal.

Order-rule made absolute.—Extract from minutes, Dec'r 12th, 1871.

U. S. circuit court, No. 5862.

JOHN D. MCLEMORE
vs.
LOUISIANA STATE BANK.

The rule taken by plaintiff on the 7th instant was called—Ran-
63 dolph, Singleton & Browne for plaintiff; Ja's McConnell for defendant—when, after hearing counsel, it is ordered that said deposition as to manner & form of taking the same be received in evidence on the trial of the cause.

Hearing and continuance of case—Extract from the minutes, March 13, 1872.

U. S. circuit court, No. 5862.

JOHN D. MCLEMORE
vs.
LOUISIANA STATE BANK.

This cause came up for trial—Randolph, Singleton & Browne for pl'ff; Ja's McConnell for defendant—when the following jurors were called and sworn to try the issue:

1. F. N. FORTIER,
2. M. HAMMERER,
3. W'M P. FRERET,
4. JOS. GENNERES,
5. JAMES KOPPEL,
6. JACOB HART,
7. BAZILE CROCKER,
8. MARCELLUS LEFROY,
9. H. REYGIA,
10. LOUIS CORMIER,
11. W. F. DUNCAN,
12. P. S. BRAND.

And the jury being complete, the trial proceeded, and after hearing the pleadings and evidence the cause is continued until to morrow at 11 a. m.

64 *Note of evidence—Filed March* 13, 1872.

JOHN D. MCLEMORE
vs.
LOUISIANA STATE BANK. } No. 5862.

Plaintiff offered in evidence documents A & B, transcribed on pages 5 & 7.

Mr. Dupuy, cashier, sworn for plaintiff; defendant offered document C, transcribed on page 30.

Plaintiff offered the minutes kept by the commissioners of the bank, under the appointment by the military authorities, page 21; said book is marked D & transcribed on pages 32.

J. V. Richards, J. R. Carroll, J. W. Hoy, J. D. McLemore, sworn for plaintiff.

Plaintiff offered depositions E, transcribed on pages 39 to 44.

C. Roselius, S. H. Kennedy, Ar. Miltenburger sworn for defense.

Defendant offered testimony of Carroll, marked F, transcribed on page 14.

Hearing and submission of case.—Extract from the minutes, March 14th, 1872.

United States circuit court, district of Louisiana.

65 JOHN D. MCLEMORE *vs.* THE LOUISIANA STATE BANK. } No. 5862.

This cause was resumed before the court and jury, and after hearing further evidence and argument, the cause being now closed, the court reserved its charge to the jury till to-morrow at 11 a. m., and ordered the cause continued till then.

Verdict and Judgment.—Extract from the minutes, March 15th, 1872.

JOHN D. MCLEMORE *vs.* THE LOUISIANA STATE BANK. } No. 5862.

This cause was resumed before the court and jury, and after receiving a charge from the court, H. Reggis was appointed foreman of the jury, and they retired to consider on their verdict. After due deliberation they returned into court and delivered the following verdict, to wit:

We, the jury, find a verdict in favor of defendant.

H. REGGIS, *Foreman.*

NEW ORLEANS, *March 15th*, 1872.

Whereupon it is ordered that the same be recorded.

66 JUDGMENT.—*From Judgment Book.*

Circuit court of the United States, fifth circuit and district of Louisiana, November term, 1871.

NEW ORLEANS, *Friday, March 15th*, 1872.

Court met pursuant to adjournment.

Present, Honorable E. H. Durell, district judge.

JOHN D. MCLEMORE *vs.* THE LOUISIANA STATE BANK. } No. 5862.

By reason of the verdict and in accordance therewith,

It is ordered, adjudged, and decreed that judgment be entered in favor of the defendant, with costs.

Judgment rendered, March 15th, 1872.

Judgment signed, March 20th, 1872.

(Signed) E. H. DURELL, *Judge.*

Motion and order to file plaintiffs' bills of exception nunc pro tunc as of date March 15th, 1872.—Extract from the minutes, Feb'y 15, 1873.

JOHN D. MCLEMORE
vs.
LOUISIANA STATE BANK. } No. 5862.

67 On motion of W. M. Randolph, esq., attorney for the plaintiff—
Ordered, that the bills of exception in this cause be filed *nunc pro tunc* as of the 15th March, 1872.

5 BILLS OF EXCEPTIONS—*filed February 15th, 1873, nunc pro tunc as of date March 15th, 1872.*

U. S. circuit court.

JOHN D. MCLEMORE
vs.
LOUISIANA STATE BANK. } No. 5862.

Be it known on the trial of this, at the request of defendants' counsel, the court charged:

First. That at the date when the pledge sued on was made, that is in February, 1861, and March, 1862, it was lawful for the pledgor to authorize the sale or other disposition of the property pledged in such manner as might be agreed on by the parties without the intervention of courts of justice.

And the court so charged the jury, and the plaintiff then and there excepted to the charge as being contrary to law, and prays this
68 his bill of exceptions be signed and sealed, which is accordingly done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

U. S. circuit court.

JOHN D. MCLEMORE
vs.
LOUISIANA STATE BANK. } No. 5862.

On the trial of this cause defendants' counsel requested the court and the court instructed:

That as by the express terms of the contract of pledge sued on, sale could be made in the event of the non-payment of the pledgee's debt at maturity. Such agreement must regulate the rights of both parties, and the sale so agreed on might be made by the pledgee after the date of such maturity without further notice to the pledgor.

And thereupon plaintiff's counsel excepted to the charge of the court, because the said charge was not in conformity to the case, and prays that this his exception be signed and sealed, which the court does.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

69 And in the same case, and at the same time, defendant's counsel asked the court to charge the jury—

3d. That when the act of pledge, as in this case, contains the following clauses: "It is hereby agreed that in the event of the non-payment of said note at maturity, or of any renewal thereof, the president and cashier of said bank are hereby authorized jointly or seperately, as agents of the

undersigned, and of the banks are hereby authorized, jointly & seperately, as agents of the undersigned & of the bank, to cause said pledged notes to be disposed of for cash at public or private sale, at the option of the said bank, and the proceeds of said sale shall be appropriated to the payment of said note, (the pledgee's debt,) and interest, and commission, costs, and charges attending the said sale."

In such case, after the maturity of the pledged notes, the notes or drafts so pledged for its payment may be sold at private sale, without notice to the pledge. The parties to the contract regulated their
70 rights respectively, both as to time and mode of sale, by the terms of the special agreement.

Which charge the court gave, & thereupon defendant's counsel excepted on the ground that such was not the case, and tendered this bill of exceptions to the same, which was signed and sealed.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

And at the same time and place defendant also requested the court to instruct the jury—

That the defendant cannot be held responsible in law for illegal acts of omissions of duty or irregularities of commissioners appointed by the military authority of the United States to liquidate its affairs, which orders are arranged, marked C, D, & B.

And the court so instructed the jury, and plaintiff's counsel excepted, because the said instructions were not law, and prayed his bill of exceptions might be signed, and sealed, which is done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

71 And at request of defendant's counsel at the same time & place, the court charged the jury as follows:

That if it appears from the evidence that an order was issued on the 11th of June, 1863, by Maj. General Banks, then commanding the military forces of the United States in this Department, by which three commissioners were appointed to effect the liquidation of the Louisiana State Bank, and to convert into cash as speedily as may be all the assets of that corporation; and if it also appears from the evidence that
72 the commission so appointed did take possession and control of the said bank, and all its assets, including the pledged notes and drafts described in the petition, and that it was during the period of such liquidation by the said military commissioners that said pledged notes and drafts were sold by said liquidators, and the proceeds appropriated to pay the debts for which they had been pledged, then, even should it appear that the said liquidators were negligent or careless, or acted illegally, in disposing of said notes, the defendant, the said bank, cannot be held liable in the premises for such neglect, irregularities, omissions of duty of said liquidators.

And the court gave the charge as requested, and plaintiff's counsel excepted to th e charge on the ground that the same was not the law, and requested that this bill of exceptions might be signed & sealed, which was done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

73 *7 bills of exceptions of Plaintiff—Filed February 15th, 1873, nunc pro tunc, as of date March 15th, 1873.*

U. S. circuit court.

J. D. McLEMORE
vs.
L'A STATE BANK. } No. 5862.

Be it remembered that on the trial of this case, plaintiff's counsel requested the court to instruct the jury—

That the acts of pledge which, for greater certainty, are annexed & made part hereof, marked "A" & "B," showing that defendant was the agent of McLemore, Rayburn & Co., to dispose of the collaterals pledged in the aforesaid acts, defendant was bound by his legal duties as agent in disposing of said collateral; and until defendant had given the pledge or notice, or put them in default for non-payment of the debt, the payment of which the collaterals were pledged to secure, it was not competent for the defendant to commute or take less for the thing pledged, than the amount of the same.

And the court refused to give the instruction as asked, & plaintiff excepted to the refusal before the jury retired, and in their presence prayed that this his bill be signed and sealed, which is accord-
74 ingly done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

And at the same time and place, and on the trial of the said case, plaintiff's counsel requested the court to charge the jury that the pledgee, w'ether selling the thing pledged as agent or pledgor, or in virtue of his right as pledgee to do so, must nevertheless use proper diligence to obtain as much for the thing pledged as possible; and if the jury believe that the liquidators of the bank, the defendant, did not use proper diligence to obtain the value of the securities pledged, and that by using proper diligence they might have obtained a larger price for the same than they did obtain, then the plaintiff is entitled to recover the difference between the amount for w'ich the collaterals were pledged, and the price which might have been obtained for them if due diligence had been used, as may be proven.

And the court refused to charge as requested, and the plaintiff's counsel excepted to the refusal of the judge, and tendered this
75 his bill of exceptions before the jury retired, and prays the same to be signed and sealed, which is accordingly done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

And at the same time and place plaintiff's counsel asked the court to instruct the jury—

That the pledgee, the defendant, had no right to sell the thing pledged without giving notice, and if the pledgors were absent, and after due diligence to give them notice they could not be found, then no sale could be made which would bar the right of redemption of the collateral by the pledgor, unless by judicial proceedings for that purpose; and if the jury find that in consequence of a sale made by the pledgee, and find that no notice was given to pledgors, and that in consequence the collaterals sold brought less than their true value, then plaintiff is entitled to recover the difference between their true value and the amount
76 to secure the payment of which they were pledged.

Which instructions the court refused, and plaintiff's counsel excepts thereto, and asks that this bill of exception be signed and sealed, which is done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

And plaintiff's counsel, at same time and place, and in same manner, asked the court to instruct the jury as follows:

The circumstances that the bank (the defendant) was, at the time of the sale of the securities pledged in this case, in liquidation under a military order, did not extinguish the corporate existence of the bank, nor relieve it, as a corporation, from the consequences of any illegal administration of its affairs by the liquidators; and if the jury find that the liquidators did not use proper diligence in disposing of the collaterals pledged, and there occurred any damage from the want of
77 such diligence to the plaintiff, then defendant is responsible in damages to the plaintiff for such loss as he may have sustained in consequence of such want of diligence, unless the jury find that the sale was made under a pressure of military power which could not be resisted.

And the court refused to instruct the jury as above requested, and then and there plaintiff's counsel excepted to the refusal, and asks the court to sign and seal the bill of exceptions now tendered, which is accordingly done, and for greater certainty the document appointing the liquidators is annexed.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

And at the same time and place plaintiff's counsel requested the court to instruct the jury—

That the pledgee, the defendant, had no right to sell the thing
78 pledged without giving notice to the pledgor, or using every reasonable effort to give such notice; and if the jury find that no such notice was given to pledgors, and no proper diligence used to give such notice, and if they believe that, in consequence of a want of such notice, a loss has occurred therefrom, then defendant is bound to make good such loss as plaintiff may prove he has sustained to the extent of the real value of the securities pledged.

Which instructions the court refused to give, & thereupon plaintiff's counsel excepted, and he tendered this his bill of exceptions, asking that it be signed and sealed, which is accordingly done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

And at the same time and place the plaintiff requested the court to charge the jury as follows:

At the time the securities pledged in this case were sold, the defendant, who were the holders of the pledge, could not sell them pri-
79 vately, & it was necessary for the holders to obtain a judgment in the ordinary course of the law, and that the same formalities in all respects were required to be observed in the sale of property so pledged as in ordinary cases of sales under the orders of court.

And the instructions the court refused to give, and thereupon the plaintiff's counsel tendered this bill of exceptions, and prays the same may be signed and sealed, which is accordingly done.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

And plaintiff's counsel also requested the court to charge the jury—

That the measure of damage against a pledgee who illegally disposes of the thing pledged is the difference between the amount which the pledge was made to secure and the value of the thing pledged.

80 And the court refused so to charge, and alleged that the charge asked for was not pertinent, inasmuch as the bank, the defendant, could not, under the circumstances, be liable for the illegal act, if any there was, in the disposition of the collaterals by the liquidators.

And the court then signed and sealed this and the foregoing exceptions.

(Signed) E. H. DURELL, *Judge.* [SEAL.]

Petition and order for writ of error.—Filed June 21, 1873.

JOHN D. MCLEMORE, PLAINTIFF,
vs.
THE LOUISIANA STATE BANK, A CORPORATION duly established by the laws of Louisiana, domiciled in New Orleans, in said State.
No. 5862. United States circuit court.

Plaintiff respectfully shows that this case was brought by original process in this court; that the matter in dispute exceeds the sum of two thousand dollars, exclusive of costs; that it is a civil action, and
81 that a final judgment has been rendered against plaintiff, by which plaintiff alleges he has been ag'rieved. He therefore prays that a writ of error may be granted to him on his giving security and complying with all the requirements of law.

(Signed) RANDOLPH, SINGLETON & BROWNE,
For Plaintiff.

Order.

A writ of error is allowed in this case, as prayed for, returnable to the Supreme Court of the United States the 2d Monday of October, 1873; plaintiff in error giving bond for costs in the sum of $250, with surety according to law.

June 21, 1873.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed August 11*th*, 1873.

Know all men by these presents, that we, John D. McLemore, as principal, and B. F. Chambers, as surety, are held and firmly bound unto the Louisiana State Bank in the full and just sum of two hundred
82 and fifty dollars, to be paid to the said Louisiana State Bank, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this eleventh day of August, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas, lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein John D. McLemore is plaintiff and the Louisiana State Bank defendant, judgment was rendered against the said John D. McLemore, and the said John D. McLemore having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Louisiana State Bank, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said

John D. McLemore shall prosecute his writ to effect, and answer
83 all damages and costs if he fail to make this plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of—

(Signed) JOHN D. McLEMORE. [SEAL.]
" B. F. CHAMBERS. [SEAL.]

84 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 83 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of John D. McLemore vs. The Louisiana State Bank, No. 5862 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 6th day of September, A. D. 1873.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 6th day of September, A. D. 1873.

E. H. DURELL, *Judge.*

85 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between John D. McLemore, plaintiff, and The Louisiana State Bank, defendant, No. 5862 of the docket of said court, a manifest error hath happened, to the great damage of the said John D. McLemore, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Nathan Clifford, associate justice of the said Supreme Court of the United States, this 21 day of June, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

86 (Indorsed:) United States circuit court. No. 5862. John D. McLemore, plaintiff in error, versus Louisiana State Bank, defendant in error. Writ of error. Filed June 21, 1873. F. B. Vinot, d'y cl'k.

87 THE UNITED STATES OF AMERICA:

United States circuit court, district of Louisiana.

The President of the United States to the Louisiana State Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein John D. McLemore is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this 11th day of August, in the year of our Lord one thousand eight hundred and seventy-three.

E. H. DURELL, *Judge.*

88 (Indorsed:) United States circuit court. No. 5862. John D. McLemore, plaintiff in error, vs. The Louisiana State Bank, def't in error. Citation.

Marshal's return.

Received Aug. 11, '73, by the U. S. marshal, and on the 19th day of August, 1873, served a copy hereof on the Louisiana State Bank, def'd't in error, by handing the same to C. L. C. Dupuy, the cashier of said bank, at its place of business, No. 33 Camp street, New Orleans.

S. W. REED,
D'y U. S. Marshal.

On this 22d day of August, 1873, personally came and appeared before me the subscriber, S. W. Reed, who being duly sworn declared that, on the 19th day of August, 1873, he served a copy of the within citation on the Louisiana State Bank by handing the same to C. L. C. Dupuy, the cashier of said bank, as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to and subscribed before me this 22d day of August, 1873.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 238. John D. McLemore, plaintiff in error, vs. The Louisiana State Bank. Louisiana C. C. U. S. Filed 13th October, 1873.

SUPREME COURT

OF THE UNITED STATES.

No. 238.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FIFTH CIRCUIT DISTRICT OF LOUISIANA.

CHARLES BOWIE SINGLETON.

A. W. Hyatt, Printer and Stationer, 48 Camp Street, N. O.

JOHN D. McLEMORE, PLAINTIFF IN ERROR,

versus

THE LOUISIANA STATE BANK

SUPREME COURT

OF THE UNITED STATES.

No. 238.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FIFTH CIRCUIT DISTRICT OF LOUISIANA.

John D. McLemore, plaintiff in error, owned a promissory note of J. P. Hawkins and Frank Hawkins, dated 12th January, 1861, payable March 1st, 1862, in his favor, for..... $9,333 00

An acceptance, A. J. Rugley & Co., draft drawn by J. B. Hawkins, dated February 14th, 1870, payable 1st January, 1863, for..... 6,666 66

A note drawn by J. B. Hawkins to the order of A. J. Rugely & Co., due 14th July, 1862..... 7000 00

Making a total of..... $22,999 66

On the 3d March, 1862, defendant in error discounted a note for the firm of plaintiff in error, J. D. McLemore & Co., at 4 months for..... $6,525 00 and pledged the above note of $9,333 to secure its payment.

On the 16th of February, 1861, defendant in error discounted for plaintiff's firm their note dated 15th February, 1861, payable 15th November, 1861, for $10,000 and to secure the payment of it took a pledge of the two notes of $6,666 66 and $7000.

There was then pledged, exclusive of interest $22,999 66

To pay a debt of..... ..... 16,525 00

If the collaterals were good, they were worth more than the new debt, the payment of which they had been pledged to secure, (exclusive of interest)..... $6,474 66

See Acts of Pledges, Record, pages 22 and 23, and answer of defendant, page 10.

On the 25th of July, 1865, Jos. W. Carroll purchased the pledged note of $9333 from the bank for Hawkins. Carroll's receipt, [Record 2].

The other two pledged notes were delivered to Carroll, [Record 3].

This receipt is without date, but the answer fixes it on the 14th August, 1865.

Exhibit X fixes the transaction with respect to the three collaterals, on the 25th July, 1865, and including an interest account between the debt and the pledge, leaves a clear balance of..... $7,723 87

For this sum and eight per cent. interest, suit is brought.

The defense rests on two grounds:

First. An order of Major General Banks of the 11th June, 1863, by which defendant in error had its management transferred from directors chosen by the stockholders to commissioners appointed by the Major General. Defendant denies that the collaterals were illegally disposed of, but insists that if they were, it was the act of the military commissioners, for which the corporation was not bound.

SECOND. The collaterals were not illegally disposed of.

It is in the instructions given by the Court to the jury on behalf of defendant, and on the refusal of the Court to instruct, as requested by plaintiff in error, that the Record discloses error, which he assigns, as follows:

I. The Court refused to instruct the jury that the Louisiana State Bank, [being confessedly the pledgees of the collaterals], was agent of pledgors, and that it could not dispose of the pledge without first demanding payment of the pledgor's debt from him, or putting him in default, and until pledgor was thus put in default pledgee could not take less for the collaterals than the amount of the same.

II. The Court erroneously refused to instruct the jury that the pledgee, in selling the thing pledged, whether as agent of pledgor or as pledgee, must use proper diligence to obtain as much for the thing pledged as possible.

III. Under the 3d and 5th instruction as asked, the Court erroneously refused to instruct the jury that pledgee was bound to give notice of his intention to sell the thing pledged, before the sale of it, and even if pledgor was absent pledgee was bound to use dilligence to give him notice of such intention, and without such notice no sale could be made otherwise than by judicial process.

IV. The Court erroneously refused to instruct the jury that, although the corporation was at the time of the sale of the collaterals pledged, in liquidation, under commissioners appointed by military authority, yet the corporation was bound for their acts of administration, although the same may have been illegal, and, if in consequence of an illegal sale of the collaterals, pledgor suffered damage, pledgee was bound to make it good.

V. The Court erred in refusing to instruct the jury, as requested in the 6th instruction, that at the time the collaterals pledged were sold, a private sale was illegal, and it was necessary for the holders of the pledge to obtain a judgment in the ordinary course

of law, and all the formalities in the sale of pledged property was required as in ordinary cases of sales under order of the Court.

VI. The Court erroneously refused to instruct the jury that the measure of damages against a pledgee who illegally disposes of the thing pledged, is the difference between the amount which the pledge was made to secure and the true value of the thing pledged.

The Court erroneously granted all the instructions asked by defendant.

I. That when the pledges were made in February, 1861, and March, 1862, it was lawful for the pledgor to authorize the sale or other disposition of the property pledged in such manner as might be agreed on by the parties without the intervention of the courts of justice.

II The Court erroneously instructed the jury, as asked by defendant in his second, [and more particularly set forth in his third instruction,] "That as by the express terms of the contract of pledge sued on, sale could be made in the event of the non-payment of the pledgee's debt at maturity, such agreement must regulate the rights of both parties, and the sale so agreed on might be made by the pledgee after the date of such maturity without further notice to the pledgor."

III. The Court erroneously instructed the jury, as requested by defendant in his fourth, and more in detail in his fifth instruction: "That the defendant can not be held responsible in law for illegal acts or omissions of duty or irregularity of commissioners appointed by the military authority of the United States, to liquidate its affairs, which orders are arranged and marked. C. D. and B."

I, II, III.

These three assignments of error present the following points:

That pledgee was entitled to notice of pledgor's intention to sell the pledge.

That a demand of pledgor for payment before the sale of the pledge was necessary.

That such demand and notice to pledgee were necessary before pledgor could sell the collaterals for less than their face.

That, under any circumstances, pledgee could not sell the pledge privately without such demand and notice.

That pledgee was bound to use due diligence to obtain as much, for the pledge as possible.

These propositions were all presented by the instructions of plaintiff, were refused by the Court and this refusal is assigned as error. The principles of law involves the consideration of a common topic, applicable to each proposition, and we shall, therefore consider them together.

"The *notice to the party* in such cases is, however, indispensable; this was conceded in Tucker vs. Wilson, and it has been since so ruled in this country." Kent Com., Vol. 2, Marg., p. 583; Comstock's Ed., of 1867, Note 1, referring to Roberts vs. Sykes, 3 Barbour, N. Y., 173; Robinson vs. Hurley, 11 Iowa, 410; Davis vs. Fauk, 39 Penn., State, 243; Brown vs. Wood, 3 Duer, 360, 1st Parsons on Cont., 602.

In Wilson vs. Little, 2 Comstock, 448, it was held that the pledgee will be held at his peril to deal fairly and justly with the pledge, both as to the time of notice and the manner of the sale, and where pledgee sells collaterals, security pledged for the payment of the debt, he is presumed to have taken it in payment; 2 Kent, Ib., Coke vs. Chaney, 14 Ala., 65; Story on Bailments, Sec. 308; Hawks vs. Hinchcliff, 17 Barb., 492. It may be argued, that the Cashier or President of the Bank was the agent of McLemore, Reyburu & Co., by their appointment. The nature of the contract is one of bailment. Story Bail., Sec. 286 N. 1. The pledgee has complete power of the thing pledged, hence the watchfulness of the law over his acts. Pledgor is regarded as completely within the power of the pledgee, hence the law requires him to be merciful. On this ground it struck with nullity a compact by which the

pledgee, on failure of pledgor to redeem, becomes entitled to the thing pledged. 2 Kent, Marg., p. 588.

Where pledgee had authority to sell, yet notice and demand of payment was necessary before pledgee could sell. Parsons on Cont., 602; Story on Bailments, Sect. 308.

IV.

The point here presented by the error assigned, is presented also in the defendants' fourth and fifth exceptions.

It is, in substance, that the corporation was not bound for the illegal act or negligence or carelessness of the commissioners who were appointed to administer its affairs. The Court seemed so well satisfied on this point, that it appeared indifferent to every other, as will be seen by the comment of the Court at the end of the last instruction, asked by plaintiff, printed Record, 28.

Defendants, Exhibit B, Rec., p. 13, shows that, on the 11th of June, 1863, from some cause, the military authorities, then administering the affairs of New Orleans, saw fit, not to dissolve the defendants' corporation, but to supercede the board of directors elected by the stockholders, by appointing commissioners to liquidate its affairs, that is, to collect its assets, pay its debts and distribute its surplus. This appointment did not certainly change the debtor or creditor relation of the bank.

On the 5th of January, 1866, a military order was issued, providing a re-transfer of the management of the bank to the stockholders, [Defendants' Exhibit C, Rec., p. 11,] The directors appointed by them took the assets in the condition in which they were at the time.

The commissioners had parted with collaterals worth, on the 25th July, 1866, including the interest, $28,683 90, to pay a debt due to the bank on that date, including interest, of $20,723. If the settlement was illegal, it was competent for them to repudiate it altogether. If it was an illegal assumption of authority on the part of the commissioners, the directors, if they ratify the act at all, must ratify the entire act. They will not be permitted to

ratify that part of it only from which they derive benefit. They shall not be permitted to say we accept the debt of $20,723, which you collected from McLemore, Reyburn & Co., with satisfaction, but although in collecting the same, you may have illegally sacrificed $7,723 87, belonging to McLemore, that part of the transaction we repudiate!

"An act cannot be affirmed as to so much as is beneficial, and rejected as to the remainder."

Clark's Executor vs. Van Riemsdyke, 9 Cranch, 153.

Dunlap's Payley on Agency, Lloyd's Ed., p. 172, and note.

V.

The assignment under plaintiff's sixth instruction, as requested presents the question, whether a *private sale* of the collaterals could have been made.

With respect to the disposition of pledges, there was a difference between the common law and the law of Louisiana, as stated by Kent, 2 Vol., 583. The Louisiana Code of 1825, Art. 3132, enacted that, "The creditor cannot, in case of failure of payment, dispose of" "the pledge, but may apply to the judge to order that the thing" "shall remain to him in payment for so much as it shall be esti-" "mated by the appraisers, or shall be sold at public auction, at the" "choice of thedebtor. Any clause which should authorize the" "creditor to appropriate the pledge to himself or dispose there-" "of, without the aforesaid formalities, shall be null."

In 1852, Session Acts, p. 15. No. 25, the law of pledge was modified, and the fourth section provides, "that in all pledges of mova-" "ble property, it shall be lawful for the pledgor to authorize the" "sale or other disposition of the property pledged, in such manner" "as may be agreed upon by the parties, without the intervention" "of courts of justice."

The following act was passed by the so-called Confederate Legislature, January 22, 1862, No. 96, virtually repealing the laws of 1852, authorizing pledgors to prescribe the terms. on which the

pledged property was to be sold, and that point re-establishing the provisions of the Code, Art. 3132. We quote the act:

"Be it enacted, etc,, That in all cases where there have been" "pledges of stocks, bonds, or other property, for the payment of" "any debt or obligation, it shall be necessary before such bonds," "stocks or other property so pledged, shall be sold for the payment" "of the debt for which said pledge was made, that the holder of" "such pledge be compelled to obtain a judgment in the ordinary" "course of law, and the formalities in all respects, shall be observ-" "ed in the sale of property so pledged, as in ordinary cases."

"SECTION 2. Be it further enacted, etc., That this act shall" "take effect from and after its passage."

This act, it will be observed, provides for the sale of pledges made before its passage.

The Legislature of 1866, by an act passed March 22d, restored the act of 1852, so far as to enable "the pledgor to authorize the "sale or other disposition of the property pledged in such manner "as may be agreed upon by the parties without the intervention of "courts of justice." Session Act, 138.

The Revised Civil Code, approved March 14th, 1870, Art. 3165, re-enacted in substance the preceding provision, and added "Any "clause which should authorize the creditor to appropriate the "pledge to himself or dispose thereof without the aforesaid formal, "ities, shall be null."

The Legislature of 1872 re-enacted the provisions of 3165 Art. of the Code, with respect to the privilege of pledgor to authorize the sale of the pledge without the intervention of a court, and omitted the restrictive clause, which we have just quoted. Session Acts-No. 9.

We have referred to these statutes for the purpose of showing that the Legislatures of the State in 1869, 1870, 1872, considered the Act of 1852, which changed the law as it existed under the Code, Art. 3132, repealed by the Act of 1862. Indeed, we suppose there can be no doubt that this act was recognized by the Consti

tution of 1868, which declared, generally, that the laws in force at the time of the adoption of that Constitution, should be declared valid, with the exception of enumerated acts, and the *pledge act* of 1862 as not within the excepted acts. Const. La., 149.

The importance of the law respecting the right of the parties to sell, without an order of court, will at once be seen, for at the time of the sale of the collaterals pledged, the law of 1862, was in force, which *prohibited* the sale of private "stocks, bonds or other property" which had then been pledged, as well as those which might be pledged thereafter; and it will be observed that the pledge of the $9333 was made after that act was passed, and the sale was made before its repeal. It is true, the pledge of the collaterals for $6666 66 and of $7000, were made before the passage of the act, but the sale was made before its repeal.

We will, in this connection, consider the instructions 1 and 2 of defendant, on the same point, pages 24 and 25, which are assigned as error. The acts of pledge contain this clause:

"And it is hereby agreed that, in the event of the non-payment"
"of said note at its maturity, or of any renewal thereof, the Presi-"
"dent and Cashier of said bank are hereby authorized, jointly or"
"separately, as agents of the undersigned and of the bank, to"
"cause said note to be disposed of, for cash, at public or private"
"sale, at the option of the said bank, and the proceeds of said sale"
"shall be appropriated to the payment of said note and interest,"
"and all commissions, costs, and charges attending the said sale."

The manner of disposing of the pledge was in issue and the subject of instruction by both plaintiff and defendant.

There can be no doubt as to the error now under consideration, and that the sale of the note of $9333 of Hawkins, which was pledged *after* the act of 1862, and sold *before* its repeal, and bought by Carroll for Hawkins, was illegal; there can be no doubt, that the note for $9333 was worth its face and interest (rec. 9, 17, 20), and no doubt Carroll gave but $4500 for it. The statement made on

the 25th of July, shows a difference of $3781 23 between the amount of the note and the value of this collateral.

How far the two collaterals, one of $7000 and one of $6666 66 pledged *before* the passage of the act of 1862, but sold before its repeal, were subject to the prohibition of pledgees to sell, imposed by the act, we will consider.

It has been said that the act of 1862, impaired the obligation of the contract of pledge, made before the passage of the act. We submit to the Court that the act of 1862 applies to the *remedy* merely. The elements of the *contract* were left untouched. The debt remained in full force; the pledge to secure its payment continued in full force. The clause of the pledge—"that the Presi-"dent and Cashier of said bank are hereby authorized, jointly or" "separately, as agents of the undersigned [McLemore, Reyburn &" "Co.], and of the bank, to cause said note to be disposed of for" "cash at public or private sale, at the option of the bank," etc., pointed to the remedy, in case McLemore, Reyburn & Co. should not redeem the pledge. It did not postpone their remedy. The bank, after the maturity of the note, on the 15th of November, 1861, might have sold the collaterals through the courts or privately, until after the passage of the act of January 23d, 1862, when the bank could immediately have proceeded, by its remedy, through the courts. This is not so strong a case as when the Legistature changes the terms of courts and thereby, in effect, suspends for a time, the remedy. Nor in cases where the statute of limitations is changed, and in such case it has always been held that such change was to be regarded as part of the remedy. 13 Pet. 312; 9 How. 407; 20 Ib, 23. The case is clearly not within the principle of that class of cases of which Bronson vs. Kenzie, 1 How., may be considered the leading one.

This point is of less importance, in view of the fact that the Court refused to instruct the jury "that the pledgee whether selling the thing pledged as agent or pledgor, or in virtue of his right

as pledgee to do so, must, nevertheless, use proper diligence to obtain as much for the thing pledged as possible.

We think we have shown by authorities under the 1st, 2d and 3d assignments, that the Court was clearly in error. So, even considering that the sale of the collaterals under the pledge of 16th February, 1861, could have been made by the President or Cashier of the Bank, the pledgeor was entitled to a fair sale in open market, and not to a private sale at its counter, to the agent of the party to the collaterals. (See Carroll's testimony, p. 19.) With proof before the jury, that the collaterals were worth the face of them, yet they were told, in substance, that pledgor might sell them for what he could get, and there was no necessity for his using any diligence to get a better price than the first offer of Carroll at their counter! If the instructions had been otherwise, the verdict would have been different.

There can be no doubt that the plaintiff's 7th instruction should have been granted. The assignment is:

VI.

The refusal of the Court to instruct the jury that the measure of damages against a pledgee, who illegally disposes of the thing pledged, is the difference between the amount which the pledge was made to secure, and the value of the thing pledged. The record discloses that there was proof before the jury that the collaterals were worth the amount of their face and interest. Besides, the principles established by the authorities referred to in assignments Nos. 1, 2 and 3. See, also, Sedgwick on the measure of Damages, (5th Ed.) M. p. 365.

CHARLES BOWIE SINGLETON.

Supreme Court of the United States.

No. 238.

JOHN D. McLEMORE, PLAINTIFF IN ERROR,

vs.

THE LOUISIANA STATE BANK.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

E. & A. C. JANIN, *Of Counsel.*

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 238.

JOHN D. McLEMORE, PLAINTIFF IN ERROR,

vs.

THE LOUISIANA STATE BANK.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiff alleged in his petition, Rec. pp. 1 and 2, that in 1861 and 1862, while he was a member of the firm of McLemore, Rayburn & Co., of New Orleans, certain commercial paper which was his private property, but kept in the firm's safe, was pledged by the firm to the defendant as security for two notes of the firm discounted by the bank; that he has tendered payment of the firm notes and demanded the return of the paper pledged, but the bank officers declared that they had not possession of the same, and could give no account of it. Plaintiff then charges that the defendant in July, 1865, illegally parted with the paper pledged; that it was worth its face, principal and interest, and that defendant is indebted to him in the principal sum of the bill and notes pledged, with eight per cent. interest per annum from their maturity, less the amount due on the said firm notes. And accordingly he demands judgment

for seven thousand seven hundred and twenty-three $\frac{87}{100}$ dollars, with eight per cent. interest from July 1, 1865.

The first note of the firm of McLemore, Rayburn & Co., mentioned in the petition as having been discounted as aforesaid, was a note for $6,525, made to the order of the bank, dated March 3, 1862, and payable four months after date.

To secure this note the firm pledged on March 3, 1862, a note of J. D. and Frank Hawkins, dated January 12, 1861, payable March 1, 1862, favor Col. J. D. McLemore, for $9,333. (Rec. p. 2.)

The other note of the firm discounted by the bank was for $10,000, to the order of the bank, dated February 15, 1861, payable November 15, 1861.

To secure this note the firm pledged to the bank on February 16, 1861:

1st. An acceptance of A. J. Rugely & Co. draft of J. B. Hawkins, favor of J. D. Hawkins, dated February 14, 1860, payable 1st January, 1863, for $6,666.66.

2d. A note of J. B. Hawkins, order of A. J. Rugely & Co., due 1–4 July, 1862, for $7,000. (Rec. p. 3.)

The acts of pledge, as will be seen from copies thereof annexed to plaintiff's petition, and found on pages 2 and 3 of the record, constituted the president and cashier of the bank, the *agents* of McLemore, Rayburn & Co. and of the bank, and authorized them, jointly or separately, *as such agents*, to cause the paper pledged to be disposed of for cash at public or private sale.

It may be noted here that the name J. *P*. Hawkins appearing in the copies of the acts of pledge as printed in the record is an error. It should be J. *D*. Hawkins. The pleadings and evidence and all the proceedings show that no such person as J. *P*. Hawkins was connected with this case. Also, it will be observed that document X, annexed to the petition, and found on page 4 of the record, is incorrect in its description of the note of McLemore, Rayburn &

Co., discounted February 16, 1861. It describes that note as being for $10,320, and due July, 1862, while according to the act of pledge of February 16, 1861, made a part of the petition, and found on page 3 of the record, the note was for $10,000, and due November 15, 1861.

The answer of the bank (Rec. p. 10) admitted that the paper described in the aforesaid acts of pledge was pledged to them by McLemore, Rayburn & Co. to secure the notes of that firm described in said acts.

The answer then averred, in substance, that on June 11, 1863, General Banks, then commanding in the department, had, without the fault or consent of defendant, and in exercise of a military power and force they were unable to resist, taken possession of the bank, with all its effects, deposits, and property of every description, including the said pledged securities, and placed the same in the custody and control of three military commissioners, with orders to effect the liquidation of the bank and convert into cash as speedily as might be all its assets; and that while the defendant bank and its property and affairs were thus being liquidated by military commissioners, to wit: on the 25th July and 14th of August, 1865, the said pledged securities were sold by said military commissioners to Carroll, Hoy & Co. and J. W. Carroll, to pay said notes of McLemore, Rayburn & Co. after the same had matured, and had for a long period of time remained unpaid. And the answer averred that if it should appear that any irregularity of any description occurred in the sale of said pledged securities, (which was denied,) then defendant could not be held liable, because such irregularities occurred, if at all, through the fault of said military liquidators, and during a period when the bank and its directors, corporators, and stockholders, were deprived, as aforesaid, by military force from all care and possession, and consequently of all responsibility for the prop-

erty and assets of said bank, including the said pledged securities.

A copy of the order of General Banks (Record, p. 13,) was annexed to the answer as part thereof. The order appointed Colonel Charles C. Dwight, A. Miltenberger, and J. M. Lapeyre, commissioners, to effect the liquidation of the bank.

There was also annexed to the answer a copy of the order of Major General Canby, dated January 5, 1866, (Record, pp. 11 and 12,) showing that the military commissioners had still at that time control of the bank and its assets.

Evidence taken by deposition and found in the record, tended to show that J. D. Hawkins and Frank Hawkins were solvent in July, 1865.

No evidence, however, appears in the record as to the solvency of J. B. Hawkins or Rugely & Co.

Jos. W. Carroll deposes (Record, p. 9,) that in July, 1865, by request of J. D. Hawkins, he bought the note of J. D. and Frank Hawkins for $9,333, from the commissioners in liquidation of the bank, and afterwards transferred it to J.D. Hawkins. The deposition of the plaintiff himself, however, (Record, p. 20,) seems to show that what Carroll bought was the note of McLemore, Rayburn & Co. for $6,525, (discounted March 3, 1862,) with the said joint note of J. D. and Frank Hawkins, attached thereto as collateral security.

It seems probable that the liquidators of the bank simply sold the two notes they had discounted for McLemore, Rayburn & Co., and along with those passed over to the purchaser, the collateral security attached to them.

From the note of evidence (Record, pp. 22, 23,) it is obvious, however, that much evidence was given which does not appear in the record.

The case was tried by jury, who found a verdict for defendant, (Record, p. 23.)

The case is presented to this court on twelve bills of exceptions, five of them to charges prayed for by defendant, and given by the court, (Record, 24, 25,) and seven to the refusal of the court to give specified charges prayed for by plaintiff, (Record, pp. 26–28.)

The first charge given by the court and excepted to by ~~defendant~~ plaintiff is as follows:

"First. That at the date when the pledge sued on was made, that is, in February, 1861, and March, 1862, it was lawful for the pledgor to authorize the sale or other disposition of the property pledged in such manner as might be agreed on by the parties without the intervention of courts of justice."

We submit that this charge was perfectly correct. It is true that the civil code of Louisiana (Art. 3132) had made null any clause in an act of pledge whereby the creditor should be authorized to dispose of the pledge by his own hand, and had in fact forbidden any disposition of the pledge except upon an order of court. But as was said by Merrick, C. J., (14 Ann. La. Rep., p. 380,) the restrictions imposed by the code upon the contract of pledge were looked upon as vexatious, and in 1852 the Legislature of Louisiana passed an act (Acts of 1852, No. 25, p. 15,) providing:

"SEC. 4. That in all pledges of movable property, it shall be lawful for the pledger to authorize the sale or other disposition of the property pledged, in such manner as may be agreed upon by the parties without the intervention of courts of justice."

The provisions of this statute were re-enacted by act of March 15, 1855. (Acts of 1855, No. 287, p. 348.) The act of 1855 is precisely the same as that of 1852, except that it contains the following proviso:

"SEC. 5. That all laws contrary to the provisions of this act, and all laws upon the same subject-matter, except what

is contained in the civil code and code of practice, be repealed."

The obvious and true intention of this proviso is obscured by the comma appearing after the words "subject matter." The Legislature certainly intended to abrogate all laws inconsistent with the body of this act, whether found in the civil code or anywhere else; and, further, to abrogate all other laws on the same subject-matter, (whether inconsistent or not,) except such laws on the same subject-matter as existed in the civil code and code of practice, and were not inconsistent with the body of the act. To construe this proviso otherwise would be to make the act a nullity, and to destroy the effect of the body of the act.

An exactly similar proviso, punctuation and all, was appended to another act of 1855 relative to the registration of notarial acts. (Acts of 1855, p. 335, No. 274.)

The supreme court of Louisiana construed this proviso, in Swann *vs.* Moore, (14 An., 833,) as nullifying the provisions of the body of the act, Merrick, C. J., dissenting. But this construction was overruled in Harang *vs.* Plattsmier, (21 An., 427,) and in Britton *vs.* Koontz, (21 An., 204,) and Rochereau *vs.* Dupasseur, (22 An., 402.) Indeed, the construction we contend against would be a monstrous absurdity.

Under the act of 1855 the law of Louisiana in respect to the validity of an agreement between pledgor and pledgee, fixing the mode of enforcing the contract of pledge, conformed to the common law. Story says, (Bailments, § 317, citing 6 Mass. R., 339:)

"In speaking of sales by the pledgee it has been assumed that there is no special agreement between the parties as to the time or mode of sale, nor any stipulation wholly interdicting any sale. If any such agreement exists it must ordinarily regulate the rights of both parties."

Under the agreements expressed in the acts of pledge in

this case, no notice was necessary to be given. For these agreements constituted the president and cashier of the bank, the *agents* of the pledgors and of the bank, to cause *the pledges to be disposed of at public or private sale.* It is not necessary to the validity of the execution by an agent of the act which he was appointed to do, that he should previously have notified his principal that he, the agent, was about to do the act.

In Deloach *vs.* Jones, 18 Louisiana, Rep. 447, a party had pledged cotton to the Real Estate Bank of Arkansas by instrument in writing, whereby he agreed to deliver the cotton to one Britton, the cashier of the bank, whom he declared to be the mutual agent of himself and the bank in the premises, and that the said cashier should ship the cotton to New Orleans and cause it to be sold. The court, after citing 2 Kent, 452, and Story, secs. 308, 310, to the effect that at common law the pledgee might have a judicial sale of the pledge, or might sell without judicial process *upon giving reasonable notice to redeem*, continues:

"In the present case the pledgor may be fairly considered as having *waived his right to notice* by his consenting that the cotton should be sold to satisfy the debt for which it had been pledged, and by thus limiting his right of redemption to his paying the debt previous to the sale of the cotton."

And further, citing Story, Bailments, sec. 317:

"This shows clearly that the parties may, by a special agreement, stipulate as to the time and mode of the sale; that such an agreement must then regulate their rights, and that it is only in the absence of such an agreement that the pledgee has to resort to the election of the two remedies pointed out by law to obtain satisfaction of his debt by a judicial sale under a decree of foreclosure, or by a sale made after notice given to the debtor to redeem."

This is the common law on the subject, as declared by the supreme court of Louisiana in 1841; but, as we have sug-

gested above, the acts of 1852 and 1855 made the law of Louisiana on this point conform to the common law.

The second and third charges, given and excepted to, are also correct, on the grounds and authorities which we have stated in defence of the first charge. They are as follows: (Rec. 24, 25.)

"2d. That as by the express terms of the contract of pledge sued on, sale could be made in the event of the non-payment of the pledgee's debt at maturity. Such agreement must regulate the rights of both parties, and the sale so agreed on might be made by the pledgee after the date of such maturity without further notice to the pledgor.

"3d. That when the act of pledge, as in this case, contains the following clauses: 'It is hereby agreed that in the event of the non-payment of said note at maturity, or of any renewal thereof, the president and cashier of said bank are hereby authorized, jointly or separately, as agents of the undersigned and of the banks, to cause said pledged notes to be disposed of for cash at public or private sale, at the option of the said bank, and the proceeds of said sale shall be appropriated to the payment of said note (the pledgee's debt) and interest, and commission, cost, and charges attending the said sale.'

"In such case, after the maturity of the pledged notes, the notes or drafts so pledged for its payment may be sold at private sale, without notice to the pledgee. The parties to the contract regulated their rights respectively, both as to time and mode of sale, by the terms of the special agreement."

The fourth and fifth charges may conveniently be considered together. They state the same propositions of law, but in the latter they are connected more closely with the evidence to which they relate.

Fourth charge: "That the defendant cannot be held responsible in law for illegal acts of omission of duty or irregularities of commissioners appointed by the military authority of the United States to liquidate its affairs, which orders are arranged, marked C, (Rec. 11, 12;) D, (Rec. 12,) and B, (Rec. 13.")

Fifth charge: "That if it appears from the evidence that an order was issued on the 11th of June, 1863, by Maj. Gen. Banks, then commanding the military forces of the United States in this department, by which three commissioners were appointed to effect the liquidation of the Louisiana State Bank, and to convert into cash as speedily as may be all the assets of that corporation; and if it also appears from the evidence that the commission so appointed did take possession and control of the said bank and all its assets, including the pledged notes and drafts described in the petition, and that it was during the period of said liquidation by the said military commissioners that said pledged notes and drafts were sold by said liquidators, and the proceeds appropriated to pay the debts for which they had been pledged, then, even should it appear that the said liquidators were negligent or careless, or acted illegally in disposing of said notes, the defendant, the said bank, cannot be held liable in the premises for such neglect, irregularies, omissions of duty of said liquidators."

We submit that these two last instructions are absolutely and certainly correct. They present the real point of the case, and are of much more consequence than the three first, which we have thought it proper to defend, but which might be considered as scarcely more than irrelevant propositions as far as this case is concerned. By the law of Louisiana, by the common law, and the law of Continental Europe, no doubt, too, by the law of every region, civilized or barbarous, the pledgee is absolved from liability for the loss of the pawn occurring from overwhelming power and force against which no care or prudence on his part could have guarded.

The civil code of Louisiana provides: (Art. 3134.)

"The creditor is answerable agreeably to the rules which have been established under the title of *conventional obligations*, of the loss or decay of the pledge which may happen *through his fault*."

The articles of the code, under the title of conventional obligations, above referred to, are as follows:

"*Of the loss of the thing due.*

"Art. 2216. When the certain and determinate substance, which was the object of obligation, is destroyed, is rendered unsaleable, or is lost, so that it is absolutely not known to exist, the obligation is extinguished, if the thing has been destroyed or lost, without the fault of the debtor, and before he was in delay.

"Even when the debtor is in delay, if he has not taken upon himself fortuitous accidents, the obligation is extinguished, in case the thing might equally have been destroyed in the possession of the creditor, if it had been delivered to him.

"The debtor is bound to prove the fortuitous accidents he alleges.

"In whatever manner a thing stolen may have been destroyed or lost, its loss does not discharge the person who carried it off from the obligation of restoring its value.

"Art. 2217. When the thing is destroyed, rendered unsaleable or lost, without the fault of the debtor, he is bound, if he has any claim or action for indemnification, on account of that thing, to make over the same to the creditor."

Another article of the code which, according to a case which we are about to cite, has application to this question, is:

"Art. 1902. The obligation of carefully keeping the thing, whether the object of the contract be solely the utility of one of the parties, or whether its object be their common utility, subjects the person, who has the thing in his keeping, to take all the care of it that could be expected from a *prudent administrator.*"

In Crocker *vs.* Monrose, 18 La. Rep., 553, it was held:

"It is true that according to the Article 3134 of the La. Code, the pledgee is only answerable for the loss or decay of the pledge which may happen through his fault; and that under the Art. 1902, his principal obligation is to take all the care of the thing pledged that could be expected from a *prudent administrator*; this rule being subject, however, to further restrictions or modifications."

In The Commercial Bank of New Orleans *vs.* Martin, 1. Annual, 344, it was held:

"If, on the other hand, we look to the duty of the bank as mere pledgees, that duty has been fully performed. The care must be that of a *prudent administrator*—in the French text, '*un bon père de famille.*' So in the Roman law: *Ea igitur, quæ diligens paterfamilias in suis rebus præstare solet, á creditore exiguntur.*' He is not subjected to the requisition of the most exact diligence." (Pothier, Nantissement, chap. 11, Art. 11, § 32, 33, 34, 2 Kent., p. 579.)

Chancellor Kent says, vol. 2, marginal paging, 579:

"If the pawn be lost by casualty, or unavoidable accident, or by *superior force*, or perishes from intrinsic defect or infirmity, the pawnee is not answerable if the loss from such causes be duly made to appear, and no act was done, or omitted to be done, inconsistent with the pawnee's duty, for he was only bound to bestow *ordinary care and dilligence.*"

So Story on Bailments, § 339:

"Another duty of the pawnee is to return the pledge and its increments, if any, after the debt or other duty has been discharged. Of course this debt or duty is, by the common law, extinguished, when the pledge is lost by casualty or other unavoidable accident, or if it perishes through its own intrinsic defects, without the fault of the pawnee. The same rule applies when the pawn is lost by robbery or by *superior force*, or even by theft, if the pawnee has exercised reasonable diligence. The same doctrine will also be found in the Roman law. * * * The modern nations of Continental Europe have fully recognized and adopted the like doctrine."

That the actions and proceedings of General Banks and the liquidators or commissioners appointed by him, as the whole is narrated in the fifth charge, constituted "superior force," such as a "prudent administrator" could not resist or prevent, does not seem to admit of the least question.

As to the charges prayed for by the plaintiff and refused,

they were neither correct nor pertinent. The first is as follows, (Rec., 26 :)

"That the acts of pledge which, for greater certainty, are annexed and made part hereof, marked "A" & "B," showing that defendant was the agent of McLemore, Rayburn & Co., to dispose of the collaterals pledged in the aforesaid acts, defendant was bound by his legal duties, as agent in disposing of said collateral; and until defendant had given the pledgors notice, or put them in default for non-payment of the debt, the payment of which the collaterals were pledged to secure, it was not competent for the defendant to commute or take less for the thing pledged than the amount of the same."

The first (Record, 26) assumes that the bank could not sell the securities pledged for less than their face without having given the pledgors notice. The authorities cited by us in support of the first three charges given by the court, show that no notice was necessary, and as the cashier of the bank was made by the act of pledge the agent of the pledgors, he could have sold the pawns for what they were worth, provided there was no fraud or negligence in the sale. Moreover, and whether the instruction was correct or not, it was not pertinent, as it assumes a fact of which there does not appear to have been any evidence, and which was disproved by the evidence, to wit, that the sale of the securities was made by the bank, and overlooks the fact, of which there was no evidence, that the sale was made by the military liquidators without the consent of the bank, and in despite of it. (See protest of the bank, Record, p. 13.)

"Prayers for instructions which overlook facts of which there is evidence, or which assume as fact that of which there is no evidence, are properly refused."

Lucas *vs.* Brooks, 18 Wall., 436.

The next instruction asked for and refused, is as follows :

"And at the same time and place, and on the trial of the

said case, plaintiff's counsel requested the court to charge the jury that the pledgee, whether selling the thing pledged as agent of pledgor, or in virtue of his right as pledgee to do so, must, nevertheless, use proper diligence to obtain as much for the thing pledged as possible; and if the jury believe that the liquadators of the bank, the defendant, did not use proper diligence to obtain the value of the securities pledged, and that by using proper diligence they might have obtained a larger price for the same than they did obtain, then the plaintiff is entitled to recover the difference between the amount for which the collaterals were pledged, and the price which might have been obtained for them if due diligence had been used, as may be proven."

This instruction is obnoxious to the same objection made to the preceding one, viz., that it assumes that the bank did sell the securities pledged, either "as agent of pledgor or in virtue of its right as pledgee to do so."

It is also incorrect in that it implies that the defendant is responsible for the laches of the liquidators.

The third instruction is as follows:

"That the pledgee, the defendant, had no right to sell the thing pledged without giving notice, and if the pledgors were absent, and after due diligence to give them notice they could not be found, then no sale could be made which would bar the right of redemption of the collateral by the pledgor, unless by judicial proceedings for that purpose; and if the jury find that in consequence of a sale made by the pledgee, and find that no notice was given to pledgors, and that in consequence the collaterals sold brought less than their true value, then plaintiff is entitled to recover the difference between their true value and the amount to secure the payment of which they were pledged."

This instruction has as little pertinence as the other two, and is worse law. It implies two errors of law, to wit, that the pledgee could not sell without notice, and that if notice could not be given the sale could only be under judicial pro-

ceedings. And it also assumes as fact that the bank did make the sale, of which there was no evidence.

The fourth instruction asked for and refused, is as follows:

"The circumstances that the bank (the defendant) was, at the time of the sale of the securities pledged in this case, in liquidation under a military order, did not extinguish the corporate existence of the bank, nor relieve it, as a corporation, from the consequences of any illegal administration of its affairs by the liquidators; and if the jury find that the liquidators did not use proper diligence in disposing of the collaterals pledged, and there occurred any damage from the want of such diligence to the plaintiff, then defendant is responsible in damages to the plaintiff for such loss as he may have sustained in consequence of such want of diligence, unless the jury find that the sale was made under a pressure of military power which could not be resisted."

The first part of this instruction was clearly incorrect. The latter part is inconsistent with itself, as it begins by admitting that the collaterals were disposed of by "the liquidators," (which amounts, in view of the pleadings and evidence, to an admission that the sale was made under irresistible military pressure upon the bank,) and concludes by leaving it to the jury to say whether there was any such military pressure. Moreover, the exception was to the refusal of the charge as a whole. "Where a charge to the jury embraces several distinct propositions, a general exception to it will not avail the party if any one of the propositions is correct."

Lincoln *vs.* Claflin, 7 Wall., 132.

So conversely a general exception to the refusal of the court to give a charge embracing several distinct propositions will not avail the party if any one of his propositions is incorrect.

Harvey *vs.* Tyler, 2 Wall., 338.

The fifth instruction is as follows:

"That the pledgee, the defendant, had no right to sell the thing pledged without giving notice to the pledgor, or using every reasonable effort to give such notice; and if the jury find that no such notice was given to pledgors, and no proper diligence used to give such notice, and if they believe that, in consequence of a want of such notice, a loss has occurred therefrom, then defendant is bound to make good such loss as plaintiff may prove he has sustained to the extent of the real value of the securities pledged."

This instruction is impertinent for the same reasons that have been stated in respect to the three first instructions refused. Moreover, it is incorrect in point of law. The bank might have sold without notice.

The sixth instruction is as follows:

"At the time the securities pledged in this case were sold, the defendant, who were the holders of the pledge, could not sell them privately, and it was necessary for the holders to obtain a judgment in the ordinary course of the law, and that the same formalities in all respects were required to be observed in the sale of property so pledged as in ordinary cases of sales under the orders of court."

This instruction is incorrect.

The authorities we have cited show that the bank might have sold at private sale, and without any judgment. The instruction is likewise impertinent, since it ignores the fact, of which there was evidence, that the collaterals pledged were taken away from the bank by military duress, and that the bank did not sell them.

The seventh and last instruction asked for by plaintiff, and refused, is as follows:

"That the measure of damage against a pledgee who illegally disposes of the thing pledged is the difference between

the amount which the pledge was made to secure and the value of the thing pledged.

"And the court refused so to charge, and alleged that the charge asked for was not pertinent, inasmuch as the bank, the defendant, could not, under the circumstances, be liable for the illegal act, if any there was, in the disposition of the collaterals by the liquidators."

This instruction was impertinent for the reason stated by the judge.

It is evident that this case turned entirely upon the question of fact as to whether or not the bank was dispossessed of the collaterals pledged by military force, and upon the question of law whether the defendant was responsible for the loss thereby occasioned.

As to the question of fact, the jury found in the affirmative, and could not possibly have done otherwise.

Apparently, and in all probability, no real contest was made as to this fact. As to the question of law, we apprehend there is no room for doubt or question. Therefore, even if there were any technical error in the instructions given or in the refusal to give others, this court would not remand the case, since another trial could produce no other result.

"It is not error to give instructions asked for, even if incorrect in point of law, provided those given cover the entire case, and submit it properly to the jury."

Laber *vs.* Cooper, 7 Wall., 565.

Mills *vs.* Smith, 8 Wall., 27.

"If for any reason appearing in the record it is clear that a plaintiff in error, who was also plaintiff below, cannot recover in the action, the court will not determine whether error was committed in instructions given to the jury respecting other parts of the case. To warrant the reversal of a judgment there must not only be error found in the

record, but the error must be such as may have worked injury to the party complaining."

Brobst *vs.* Brock, 10 Wall., 519.

"Where the record shows that the case of a plaintiff is inherently and fatally defective, a judgment against him will not be reversed for instructions, however erroneous."

Barth *vs.* Clise, sheriff, 12 Wall., 400.

"When on the undisputed parts of a case a verdict is clearly right, so that if a new *venire* were awarded the same verdict would have to be given, a court will not reverse because on some disputed points a charge may have been technically inaccurate."

Respectfully submitted,

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